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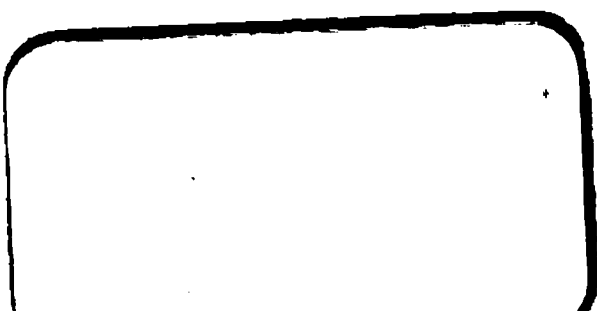
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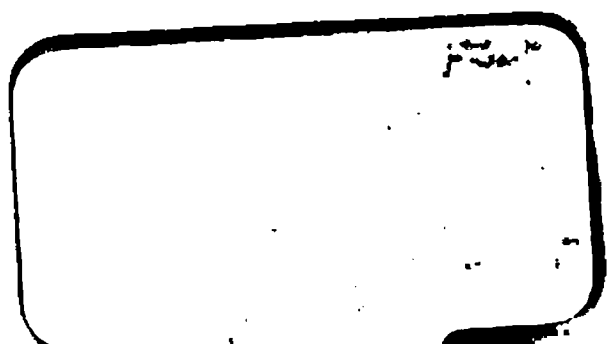
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench,

WITH TABLES OF THE NAMES OF THE CASES
AND THE PRINCIPAL MATTERS.

BY

GEORGE MAULE and WILLIAM SELWYN, Esqrs.
OF LINCOLN'S INN, BARRISTERS AT LAW.

*Sit ergo in jure civili finis hic, legitimæ atque usitatæ in rebus causisque
civium æquabilitatis conservatio.* CICERO.

VOL. IV.

Containing the Cases of EASTER, TRINITY, MICHAELMAS, and HILARY
Terms, in the 55th and 56th Years of GEORGE III. 1815, 1816.

LONDON:

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AND J. COOKE, ORMOND QUAY, DUBLIN.

1817.



J U D G E S
OF THE
COURT OF KING'S BENCH,
During the Period of these REPORTS.

EDWARD LORD ELLENBOROUGH, C. J.
SIR SIMON LE BLANC, Knt.
SIR JOHN BAYLEY, Knt.
SIR HENRY DAMPIER, Knt.

ATTORNEY-GENERAL.
SIR WILLIAM GARROW.

SOLICITOR-GENERAL.
SIR SAMUEL SHEPHERD.

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C A S E S

ARGUED AND DETERMINED

1815.

IN THE

Court of KING's BENCH,

IN

Easter Term,

In the Fifty-fifth Year of the Reign of GEORGE III.

BECKETT and Another, Assignees of MARY GOULD, Widow, a Bankrupt, *against* HARDEN and Another. (a)

THOMAS Lucas Wheeler, being seised in fee of certain estates and plantations in the island of *St. Christopher*, by his will, dated the 1st of February

Devise to J. B. of all his plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, and hereditaments in the island of *St. Kitts*, to hold to J. B., his heirs, executors, &c., according to the nature and quality thereof, to the use that W. B. should have one clear annuity or rent-charge of 150*l.* for his life, to be issuing out of said plantations, &c., and subject to and chargeable as aforesaid to the use of J. B., his heirs, executors, &c. according to the nature and quality of the premises. Codicil, reciting the death of W. B. devised the said annuity to trustees in trust for M. G. for life, to be raised out of his said plantations and estates, and paid in same manner and with like remedies as directed in favour of W. B. Second codicil revoked that part of first in which he had given to M. G. 150*l.* per ann., and instead thereof he gave 20*l.* per ann. to M. G. for life. Third codicil revoked that part of will in which he devised to J. B. all his estate and property in *St. Kitts*, and declared the same void, and gave and bequeathed the said property to J. P. in fee. Held that the annuity given to M. G. by the 1st codicil was not revoked by the last codicil, nor reduced by the 2d codicil, the 2d codicil not being executed according to the statute of frauds, which is in force in the said island of *St. Christopher*.

(a) This case was argued at Serjeants' Inn before last *Hilary* term.

CASES IN EASTER TERM

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BECKETT
against
HARDEN.

1786, duly executed to pass freehold estates, devised to *John Beach* all and singular his plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, and hereditaments, with their and every of their appurtenants, in the island of St. Christopher, to hold the same to the said J. Beach, his heirs, executors, administrators, and assigns respectively, according to the nature and quality thereof, to the use and intent that Wm. Beach, brother of the said J. Beach, and his assigns, should have and take one clear annuity or yearly rent of 150*l.* for and during the term of his natural life, to be issuing and going out of and charged upon the said plantations, lands, tenements, hereditaments, and premises in the said island of St. Christopher, and every or any part thereof, to be paid free of all taxes, &c. by quarterly payments, &c., and so in proportion if the said *W. B.* should happen to die before the quarter day, with power of distress and re-entry for non-payment of the same: and as to the said plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, hereditaments, and premises, subject to and chargeable as aforesaid, to and for the only proper use and behoof and benefit of the said *J. Beach*, his heirs, executors, administrators, and assigns respectively, according to the nature and quality of the premises.

And the testator, after devising all the residue of his real and personal estates, subject to certain charges and upon certain trusts, also charged the said plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, hereditaments, and premises, so by him given to *J. Beach*, but without prejudice to the said annuity or yearly rent-charge of 150*l.* limited to *W. Beach*, with the payment of 500*l.* for and towards making good a moiety of any deficiency in the funds directed to be applied to such charges and trusts, or in

case

IN THE FIFTY-FIFTH YEAR OF GEORGE III.

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case a less sum should be sufficient, with the payment of such less sum, to be raised by mortgage or sale, &c.

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HARDEN.

Afterwards the testator, by a codicil to his will, dated the 27th of March 1789, duly executed to pass freehold estates, reciting the death of *W. Beach*, devised as follows: “*Now I do therefore hereby give and be-*

1st codicil.

*queath the annuity or yearly rent-charge of 150l., which by my said will was limited and directed to be paid to the said W. Beach, for and during the term of his natural life, out of all and singular my plantations, lands, tenements, stock, utensils, hereditaments, and estates, situate, lying, and being in the island of St. Christopher, to W. Withers and F. Fortescue, in trust for the sole and separate use and benefit of Mary Gould, wife of, &c. for and during the term of her natural life, and which I direct to be raised out of my said plantations and estates, and to be paid by the said trustees, or the survivor of them, or his heirs, by even quarterly payments, on the same feasts or days, and with the same powers and remedies in every respect as the said annuity or yearly rent-charge was by my said will directed to be raised out of the said estate, and paid to the said W. Beach during his life.” And he directed the trustees to pay the same to *M. Gould* or her appointee, free from all controul of her husband, &c., and that her or their receipt should be a sufficient discharge. And from and immediately after the decease of *M. Gould* he thereby gave the like annuity or yearly sum of 150l. to the said trustees and their heirs, in trust for the benefit of *W. Gould*, second son of the said *M. Gould*, for and during the term of his natural life, and which he thereby charged upon his said plantations and estates in the said island of *St. Christopher*, and every part thereof, and directed the same to be paid thereout to him by even quarterly pay-*

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2d codicil.

3d codicil.

ments on the same days or times, and with the same powers and remedies in every respect as the said annuity or yearly sum of 150*l.* was in and by his will limited, directed, or appointed to be paid to the said *W. Beach* during his life; and if the said *W. Gould* should be under 21 at the time of his mother's decease, then a sufficient part thereof for his maintenance and education during his minority, and the residue to be laid out at interest, and accounted for when he should come of age. And he thereby also revoked the appointment of *T. Plummer* as one of the executors of and in his said will, and appointed the said *W. Withers* and *J. Fortescue* executors of his said will, in place of the said *W. Beach*, deceased, and the said *T. Plummer*, and subject to the several alterations and revocations thereinbefore made, he in every other respect ratified and confirmed his said last will, and directed that to be added as a codicil thereto. Afterwards the testator, by another codicil, dated the 28th of October 1790, and which was published by him in the presence of one witness only, revoked and made void that part of the former codicil in which he had given to *M. Gould*, and after her death to her 2d son *W. Gould* for his life 150*l.* per ann., and instead thereof he gave the sum of 20*l.* per ann. only to the said *M. Gould* for her life, and not to be continued to her said 2d son *W. Gould* after her death. Afterwards he made a 3d codicil to his will, dated the 30th of December 1790, duly executed to pass freehold estates, which codicil is as follows: “ *I Thomas Lucas Wheeler do revoke that part of my will in which I gave and devised to John Beach all my estate and property in the island of St. Kitts, and do declare by this codicil to my said will that the said bequest is made null and void; and I give and*

bequeath the said property in the said island of St. Kitts to my invaluable friend Joseph Paice, Esq. to him and his heirs for ever." The statute of frauds and perjuries was, at the date of the 2d codicil, and still is in force in the island of *St. Christopher*. The testator died in *June 1792*, and *M. Gould* assigned the annuity to *Thomas Holloway*, by way of mortgage by indenture, on the *16th January 1796*, and in *September 1797* was duly declared a bankrupt, and the plaintiffs are the assignees. Afterwards, by order of the Lord Chancellor, the annuity and all arrears thereof were, at the instance of *T. Holloway*, and with the consent of the plaintiffs, put up to auction, and the plaintiffs, as such assignees, became the purchasers, in trust for themselves and the other creditors; and by indenture, dated the *17th of March 1801*, between the said *T. Holloway* of the one part and the plaintiffs of the other, the said annuity and all arrears were assigned to the plaintiffs absolutely in trust for themselves and the other creditors of the said bankrupt. The plaintiffs, as such assignees, filed their bill in Chancery against the defendants *N. Harden* and *Joseph Paice*, to compel payment of the said annuity, and upon the hearing of the cause the Master of the Rolls directed this case to be submitted to this Court for their opinion upon the following question :

Whether the annuity of *150l.* mentioned in the will, and given by the 1st codicil of the testator to *M. Gould*, was revoked or reduced by all or any of the subsequent codicils.

J. Warren, for the plaintiffs, argued, 1st, that the annuity to *M. Gould* was not revoked by the 2d codicil,

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by reason that the annuity was primarily charged upon the land, and therefore the 2d codicil was not well executed to revoke it. That the annuity to *M. G.* was primarily charged on the land, he said, was plain from the will, which gave it to *W. B.* *to be issuing and going out of, and charged upon the plantations, lands, &c.,* and the 1st codicil gives the annuity to *M. G.* which was by the will given to *W. B.* And so the 2d codicil is not well executed to revoke it; because the rule, as laid down by Lord *Hardwicke* in *Brudenell v. Boughton (a)*, is, “that as no devise of lands can be made but with such solemnity as is directed by the statute of frauds, so it is equally clear, where a sum of money is given originally and primarily out of land, a will with that charge must be executed with the same solemnity; and the rule is the same with respect to a revocation of a sum of money charged by a will upon lands; it must be revoked in the same manner.” At all events, supposing the 2d codicil to have any effect at all, it can only have the effect of reducing the annuity from 15*ol.* to 2*ol.* Next, Whether the annuity to *M. G.* was revoked by the last codicil, may be considered in two ways; 1st, Whether the express words of revocation extend to it; 2dly, Whether it is impliedly revoked by force of the subsequent general devise to *J. Paice* and his heirs. 1st, The express words of revocation in the last codicil only extend to that part of the will by which the estate, &c. is devised to *J. B.*; but the annuity is given to *M. G.* in a different part of the will, viz. the 1st codicil. 2dly, The general devise to *J. Paice* is not an implied revocation of the annuity, because the rule of law is, that a subsequent devise shall not revoke by implication

(a) 2 Atk. 272.

a preceding devise, unless it be inconsistent with it. But there is no inconsistency in the devise of the annuity to *M. G.* and the subsequent devise to *J. P.* and his heirs, because a charge upon the land may well stand with a devise of the fee. And, according to *Welcden v. Elkington* (a), *Paramour v. Yardley* (b), even if the devise of the fee had come first, and the charge afterwards, it would have been good; because it is the office of the Court so to marshal the words, that the one part may be consistent with the other. Therefore, if *A.*, seised in fee, devise to *B.* and his heirs, and afterwards, in the latter part of his will, devise a rent out of the land to *C.*, this shall be a good devise of the rent to *C.* and of the land to *B.*, for the devise of the rent shall be construed to precede the devise of the land, by which means all repugnancy shall be avoided. A fortiori the devise of the annuity in this case shall be good, where the testator has himself marshalled the order of devise, making the lesser to precede the greater. And here the will and codicils are to be taken together as one instrument, and the codicils are not like a second will, though even if they were, *Coward v. Marshal* (c), recognized by Lord *Hardwicke* in *Willet v. Sandford* (d), is a strong authority to shew that this would not be a revocation. So in *Lamb v. Parker* (e) a subsequent demise of lands was held not a revocation of a prior devise of them. And as there is not any inconsistency, neither is there any intent apparent in the last codicil to revoke the annuity; all that appears is that the testator intended to give to *J. P.* the same estate that he had taken from *J. B.*, i. e. an estate charged with the

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against
HARDEN.

(a) *Plowd.* 523. (b) *Ib.* 541. (c) *Gro. Eliz.* 721. (d) 1 *Ves.* 187.
(e) 2 *Vern.* 495. 8 *Fin.* 140. *Devise, R.* 2. pl. 16. 1 *Br. P. C.* 160.

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against
HARDEN.

annuity; and therefore *J. P.* is a trustee for the annuitant in like manner as *J. B.* was before him; but it is a rule that the substitution of one trustee for another, though it revoke the legal estate which supports the trust, shall not revoke or alter the trust itself. (a)

Taddy, contra, admitted, upon the authority of *Plowd.* and the other cases, that the Court, in construing a will, may so order the reading of it as to give effect to devises apparently inconsistent; also that a subsequent devise is not an implied revocation of a preceding devise, unless there be some inconsistency either in law or fact between them. Still, however, he maintained that the last codicil revoked the annuity given to *M. G.* by the first. The language of the testator in the last codicil is express to that effect, *he revokes that part of his will in which he devised all his estate to J. B., and declares the same to be null and void.* Now the annuity given to *W. B.* was given to him in that part of the will by which the testator devised all his estate to *J. B.*, and was in effect a part of that estate; and what is the annuity to *M. G.* but the very same that was before given to *W. B.*? Therefore, if the estate of *J. B.* be revoked, shall not the annuity, which is part of the estate, be revoked also? It can only subsist by way of rent-charge upon the estate of *J. B.*, consequently, when the estate is destroyed the rent-charge is at an end, there being nothing left upon which it can operate. But next, if it were doubtful upon the express terms of revocation, it is clear that the devise to *J. P.* amounts to an implied revocation; be-

(a) *Willot v. Sandford*, 1 Ves. 178. 186.

cause the testator, after having revoked his former devise, which was a devise to a particular use, devises the estate generally without any use to *J. P.* in fee. And how is it consistent with such a devise to say that the estate of *J. P.* shall, notwithstanding, be subject to the use? As well might it be said that if the testator had merely revoked his former devise without any fresh devise, the estate would have descended to the heir subject to the use. Then if the devise in the last codicil to *J. P.* be a fresh gift of the estate, and not a mere substitution of one trustee for another, but the legal estate be thereby altered, it seems, from *Goodtitle v. Otway* (a), that the effect of it is to annul the former devise. Lastly, Whether the annuity given by the 1st codicil to *M. G.* be revoked in toto or not, at least it is revoked pro tanto by the 2d codicil, and is good only for 20*l.* For, as in the case of *Brudenell v. Boughton* (b), so this annuity is to be taken originally as personal, notwithstanding it is also charged on the land; and so it may be modified, and consequently revoked pro tanto by the 2d codicil, although the 2d codicil be not executed according to the statute of frauds. In like manner, if the land be charged by the will generally with the payment of legacies, a codicil not executed according to the statute will nevertheless be good to pass new legacies or revoke old ones, and yet they are a charge on the land, *Masters v. Masters* (c), *Buckeridge v. Ingram* (d), *Shedden v. Goodrich* (e), *Rose v. Cunynghame*. (f)

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 BECKETT
 against
 HARDEN.

(a) 1 *B. & P.* 576. 7 *T. R.* 399. (b) 2 *Atk.* 268.
 (c) 1 *P. W.* 423. (d) 2 *Ves. jun.* 665. (e) 8 *Ves.* 495.
 (f) 12 *Ves.* 37.

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against
HARDEN.

J. Warren, in reply, denied that the annuity to *M. G.* was personal, being charged on the estate, and not on any thing separate from the estate; and therefore it fell within the distinction of being primarily charged on land, though incidentally the personalty, in combination with the land, was liable, whereas in *Brudenell v. Boughton* the testator charged all his real and personal estate.

Cur. adv. vult.

The following certificate was sent:

THIS case has been argued before us by counsel. We have considered it, and are of opinion that the annuity of 150*l.* mentioned in the will, and given by the 1st codicil of the testator to *Mary Gould*, was not revoked or reduced by all or any of the subsequent codicils.

ELLENBOROUGH.

S. LE BLANC.

28th February 1815.

J. BAYLEY.

Thursday,
April 13th.

DOE, on the Demise of WHITE, *against* BARFORD
and Another.

J. B. married and afterwards made his will and devised to his niece, and afterwards died, leaving his wife enseint with a daughter, which was unknown to him: Held that the birth of the daughter was not a revocation of the will.

AT the trial of this ejectment, before *Heath J.*, at the last *Cambridgeshire* assizes, the case was this:

The plaintiff claimed under the will of one *J. Bonteel*, who, being seised in fee in 1791, married, and in 1792 made his will, and devised the premises in question to his niece, from whom the plaintiff derived title. *J. B.* died leaving his wife enseint, which was unknown to

either

either of them at the time of his death, and afterwards the wife was delivered of a daughter, from whom, as heir at law, the defendants derived title. And the question was, Whether this alteration of circumstances was an implied revocation of the will. The learned Judge ruled that it was not, and there was a verdict for the plaintiff.

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against
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And now *Blosset* Serjt. moved for a nonsuit, and submitted that the birth of a posthumous child, where the testator dies childless, was such an alteration of circumstances as ought to be deemed in law a presumptive revocation of his will. According to *Doe v. Lancashire* (a), marriage and the birth of a posthumous child amounts to a revocation; and though, according to *Shepherd v. Shepherd* (b), it does not seem that the having a posthumous child where there are children already born will singly suffice to raise such a presumption, yet where there are no children of the marriage except the posthumous child, that works such a total change of circumstances as may reasonably afford the presumption of an intended revocation. And it is remarkable that Dr. *Hay*, in his judgment in *Shepherd v. Shepherd*, instances what is very nearly the case at bar: "Suppose," says he, "a man should have been married 20 years, and that his wife should prove pregnant for the first time at the end of that period, and he should die before it could be known with certainty that she was so, I should think, in such a case, that the birth of a posthumous child would be a strong circumstance of inducement to set aside the will." It

(a) 5 T.R. 49.

(b) *Ib.* 51. n.

may

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—
Doe
against
BARFORD.

may be observed also, that the rule is borrowed from the civil law, which puts it entirely upon the birth of a posthumous child. (a)

Lord ELLENBOROUGH C. J. The argument seems to be, that because the testator, had he known his situation, ought to have revoked his will, therefore the law will impliedly revoke it. But if it is to be understood that every will is made upon a tacit condition that it shall stand revoked whenever the testator by the circumstance of the birth of a child becomes morally bound to provide for it, I do not see why the birth of any one of a numerous succession of children would not equally work a revocation. But where are we to stop? Is the rule to vary with every change which constitutes a new situation giving rise to new moral duties on the part of the parent? Marriage, indeed, and the having of children, where both those circumstances have concurred, has been deemed a presumptive revocation, but it has not been shewn that either of them singly is sufficient. I remember a case some years ago of a sailor who made his will in favour of a woman with whom he cohabited, and afterwards went to the *West Indies* and married a woman of considerable substance; and it was held, notwithstanding the hardship of the case, that the will swept away from the widow every shilling of the property; for the birth of a child must necessarily concur in order to constitute an implied revocation. In *Doe v. Lancashire* it was adjudged that marriage and the pregnancy of the wife with the knowledge of the husband, and the subsequent birth of a posthumous

(a) *Just. lib. 2. tit. 13. De Posthumis.*

child,

child, came within the rule, the same as if the child had been born during the parent's life. In this case it is desired of us to extend the rule a step farther, but I own I am afraid of so doing.

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DOE
against
BARFORD.

LE BLANC J. Lord *Kenyon* considered the rule as founded upon a tacit condition annexed to the will, that if the party should marry and have a child it should not take effect.

Per Curiam,

Rule refused.

Bass and Another *against* CLIVE.

Thursday,
April 13th.

ASSUMPSIT by the plaintiffs as indorsees, against the defendant as acceptor of the following bill of exchange:

“ £. 380

London, 25th Feb. 1814.

Three months after date pay to our order 380l., value received.

Ellis, Needham, jun. and Co.

To Mr. *T. Clive*.”

And the plaintiffs declared as upon a bill drawn by certain persons trading under the name, style, and firm of *Ellis, Needham, jun. and Co.*, payable to *their* own, to wit, the order of the said *Ellis, Needham, jun. and Co.*, and indorsed, &c. And at the trial before Lord *Ellenborough* C. J., at the *London* sittings after last *Michaelmas* term, because it was proved that only one person constituted the firm of *Ellis, Needham, jun. and Co.*, therefore it was objected that here was a variance. His Lordship directed a nonsuit, but gave the plaintiffs liberty

A bill of exchange, drawn in this form: “ Pay to our order,” &c. signed in the name of two persons and Co., and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate firm, and if it be proved that the firm consists of only one person, yet it is not a variance.

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BASS
and **Another**
against
CLIVE.

liberty to move (a). *Topping* accordingly, in the last term, obtained a rule nisi for a new trial,

E. Lawes, who shewed cause, admitted that the bill imported primâ facie to be drawn by a firm consisting of more than one person, yet, he said, as the plaintiffs received it from *Needham, jun.*, the drawer, they must be intended to know that he alone was concerned in the drawing it. And doubtless they might have declared as upon a bill drawn by him, though the bill purport to be drawn by a firm comprising more persons than one. If, therefore, the plaintiffs might have averred and proved contrary to the fact apparent on the face of the bill, the defendant shall not be estopped from doing the same.

LORD ELLENBOROUGH C. J. Is not the acceptor, before he accepts a bill drawn upon him in the name of an aggregate firm, bound to know whether the firm consists of a plurality of persons or not; and if he does accept the bill, is he not estopped from averring that it is not in fact drawn by an aggregate firm, when he himself has accredited the description by accepting it when so drawn? It struck me at the trial that the plaintiffs should have framed their declaration as if the bill was drawn by an individual in the name of an aggregate firm; but, as it is, they have declared according to the terms in which the defendant has accepted the bill. The words "pay to our order" naturally import a plurality of persons, and the plaintiffs would have violated the letter if they had described it as

(a) See 4 Campb. N. P. C. 78.

drawn

drawn in the singular. Besides, the defendant has by his acceptance, led them into the error; and how can the indorsees of a bill be supposed to have any knowledge of the firm of the drawers beyond that which the bill conveys to them? A person who takes a bill is warranted in taking it according to the ordinary import of its terms, and treating it so, and it would introduce vast inconvenience if it were otherwise, and if the party declaring must never venture to predicate either the singular or plural, though the terms of the bill clearly import it. The point was saved at the trial upon the impression which I then had, but I now think my present view of it the more correct one.

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and Another
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CLIVE.

LE BLANC J. The bill being drawn in the plural, "to our order," satisfies the mode of declaring upon it.

BAYLEY J. Possibly the plaintiffs might have declared according to the fact as it exists; but they may also declare according to the fact as the defendant says it exists. The defendant, by his acceptance, has said, there is a firm of *Ellis, Needham, jun. and Co.*, and that to *their* order he will pay it. He is precluded from saying that the word "our" is not well applied; after having recognized the firm in the plural he is not now at liberty to deny it.

DAMPIER J. Suppose the drawer's name is forged, yet if the drawee accept the bill, he is precluded from averring as against strangers that it is a forgery. So here the defendant, by his acceptance, has verified the word "*our*."

Rule absolute.

1815.

Thursday,
April 13th.

COWIE and Others *against* BARBER.

The assured were held not entitled to a return of premium upon a policy at and from a place within the limits of the *South Sea Company's* charter, the ship being without a licence from the *S. S. Company* at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could, and before they knew of her loss, and the licence was made to relate to a time antecedent to the loss.

A ship which is sent to a place within the limits of the *S. S. Company's* charter, in order to bring home part of a return cargo of another ship, is not protected by the licence granted by the *S. S. Company* to that other ship.

A licence granted by the *S. S. Company* cannot operate retrospectively.

ASSUMPSIT on a policy of assurance, dated 11th *July* 1810, at and from the ship's port or ports of loading in the river *Plate* to *London*, on the ship *Jane* and goods, beginning the adventure on the goods from the loading at the river *Plate*, and on the ship from her arrival there. Loss by seizure and detention of the government of *Buenos Ayres*. Money counts. Plea, non assumpsit.

At the trial before Lord *Ellenborough* C.J. at the *London* sittings after *Michaelmas* term, the case was this:

The ship *Jane*, with the goods on board, was seized by the government of *Buenos Ayres* in *June* 1810, in the river *Plate*, and within the limits of the *South Sea Company's* trade. At that time she was without a licence, but, before any knowledge of the capture, the plaintiffs, who were the charterers, procured a licence, dated the 13th of *September* 1810, for 18 months from the 1st of *March* preceding, under the following circumstances: The ship *George Canning*, having a licence from the *South Sea Company*, sailed with a cargo from this country to the river *Plate*, and being unable to bring home the whole of her return cargo, the ship *Jane* was sent on from *Rio Janeiro* by the agent of the charterers, for the completion of that object, and as soon as the charterers were informed of her being so sent, they applied for and procured the above licence. It was contended at the trial, 1st, that the *Jane* required no licence, being covered by the licence to the *G. Canning*,
with

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with which ship she was in fact united in the same adventure; and that would satisfy the words of stat. 9 *Ann. c. 21. s. 47.*; but if not, then, 2dly, it was contended that the licence to the *Jane* was good, though it was admitted that in *Hobbs v. Hannam* (a) Lord *Ellenborough* inclined to a contrary opinion. His Lordship ruled that the licence being to the *G. Caning* nominatim, could not be extended farther; also that the licence to the *Jane* could not operate retrospectively; and therefore this voyage, not being within the protection of 9 *Ann. c. 21. s. 47.*, the plaintiff was not entitled to recover upon the policy (b). It was then submitted that the plaintiff was entitled to a return of premium, the risk having never attached; but that was resisted on the ground that the voyage was illegal without a licence, coming within the penalties enacted by 9 *Ann. c. 21. s. 49.* His Lordship inclined to think that as there was nothing illegal on the face of the policy, the policy was, under the circumstances, void, and the risk never attached; and therefore directed the jury to find for the plaintiff for the premium, giving liberty to the defendant to move for a nonsuit.

Accordingly a rule nisi to that effect was obtained in the last term, when several authorities were mentioned, viz. *Lowry v. Bourdieu* (c), *Andree v. Fletcher* (d), *Vandyk v. Hewit* (e), *Morck v. Abel* (f), *Lubbock v. Potts*. (g)

(a) 3 *Campb. N. P. C.* 95.(c) *Dougl.* 467. 3d edit.(f) 3 *B. & P.* 35.(b) 4 *Campb. N. P. C.* 100.(d) 3 *T. R.* 266.(e) 1 *East*, 96.(g) 7 *East*, 456.

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Park, Nolan, and Scarlett, shewed cause, and distinguished those cases as having been decided upon the rule “in pari delicto potior est conditio possidentis,” which rule does not apply to a case like this, where there is not any criminality. And if it did, it may be doubtful how far that rule is reconcileable with what Lord *Mansfield* lays down as the rule in *Tyrie v. Fletcher* (a), “that where the risk has not been run, whether its not having been run was owing to the fault, pleasure, or will of the assured, or to any other cause, the premium shall be returned; because a policy of assurance is a contract of indemnity. The underwriter receives a premium for running the risk of indemnifying the assured,” and whatever cause it be owing to, if he does not run the risk, the consideration for which the premium was put into his hands fails, and therefore he ought to return it.” Also, in *Neville v. Wilkinson* (b), the Lord Chancellor considered the rule as clear, that in all cases where money was paid for an unlawful purpose the party, though particeps criminis, might recover at law. *Wharton v. De la Rive* (c) seems to have been ruled upon that principle; and so in *Jaques v. Golightly* (d), *Jaques v. Withy* (e), the premium was allowed to be recovered back, though both parties were sharers in the offence. But, without insisting on the rule to such an extent, it is enough that *Oom v. Bruce* (f) has expressly decided that the illegality of the insurance shall not prevent the assured from recovering back the premium, if no fault be imputable to him in making the insurance. And the legislature certainly so con-

(a) *Cowp.* 668. (b) 1 *Br. Ch. R.* 547. (c) *Park. Insur.* 376. 4th ed.(d) 2 *Bl. R.* 1073. (e) 1 *H. Bl.* 65. (f) 12 *East*, 225.

sidered it when they declared, by stat. 28 G. 3. c. 38. s. 48., all insurances on wool to be exported illegal, and yet deemed it necessary to add, that upon such insurances the premium should not be recovered. Now here, as in *Oom v. Bruce*, the assured contemplated nothing illegal; on the contrary, they did all in their power to comply with the law. The ship was sent to the river *Plate* by their agent without their knowledge, and as soon as they knew it they applied to the *South Sea Company* and procured a licence. Granting that the licence cannot operate retrospectively to make good the insurance, yet it may operate as a remission on the part of the company of their portion of the penalty incurred by the plaintiffs; and thus, though the insurance be void, give it so much of legality, if that be necessary, as to entitle the assured to a return of premium. *Toulmin v. Anderson* (a) differs from this, inasmuch as no licence whatever was obtained in that case.

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 COWIE
 against
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LORD ELLENBOROUGH C. J. If the licence cannot operate retrospectively to render the whole lawful it cannot do so in part only for the purpose of giving a right to recover the premium. The ship itself was forfeited (b). If it had appeared that orders were given for procuring a licence antecedently to the time when the risk commenced, it might have been said that here was not a sinning against the act of parliament; but nothing of that sort appears. And this is an insurance *at and from*, therefore it is incumbent on the assured to look to the insurance, that it is lawful at the place

(a) 1 *Toum.* 227.(b) 9 *Ann. c. 21. s. 49.*

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TARLETON
against
TARLETON.

no such claim or demand as alleged in the 2d breach remained due, &c.; 3dly, That *F.B.*, *C.B.*, and *J.U.B.* had not any such claim or demand of which they were entitled to receive and enforce payment, &c. Issue taken on these pleas. At the trial, before Lord *Ellenborough* C. J., at the *London* sittings after last term, the plaintiff proved the indenture, and also an examined copy of the proceedings in the court of *Grenada*, by which it appeared that the decree passed against the defendant and *W.P.* in the original suit *pro confesso* for want of an answer. The defendant, in maintenance of his pleas, proposed to shew that the proceedings in the court of *Grenada* were erroneous, inasmuch as the account was incorrectly taken. His Lordship, however, ruled that the defendant could not go into that question, inasmuch as the foreign court being a court of competent jurisdiction, what was done in it must, for the purpose of this action, be taken to be rightly done; and the plaintiff had a verdict.

Casberd moved for a new trial, upon the ground that the proceedings in the foreign court were not conclusive evidence. He said that where a foreign judgment is the subject-matter of a suit in this court, it was but *prima facie* evidence, and the defendant might impeach the justice of it. (a)

LORD ELLENBOROUGH C. J. I thought that I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings in the court abroad. The defendant had notice of the proceedings, and should have

(a) See *Walker v. Whitter*, *Dougl.* 1., and notes to that case.

appeared

appeared and made his defence. The plaintiff, by this neglect, has been obliged to pay the money in order to avoid a sequestration.

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against
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BAYLEY J. How is this plaintiff to be called upon to unravel these proceedings? As between the parties to the suit the justice of it might be again litigated, but as against a stranger it cannot. The defendant was a party to the suit, and has concurred, by his not appearing to it, in suffering the plaintiff to be damnified.

Per Curiam,

Rule refused.

ROE, on the Demise of LARKIN, *against*
CHENHALLS and Another.

Saturday,
April 15th.

IN ejectment for a messuage and land in Kent, tried before *Chambre J.*, at the last assizes, the question was, Whether an indenture of lease, then expired, by which the premises were demised for three years at a pepper-corn rent, for the consideration of 300*l.*, was duly stamped, the indenture having only a lease stamp. It was contended for the defendants that as it passed an interest in consideration of a gross sum, it was a conveyance upon a sale of lands, and ought to have had an ad valorem stamp. The learned Judge directed a verdict for the plaintiff, giving the defendants liberty to move for a nonsuit.

A lease for years in consideration of a sum certain, and at a pepper-corn rent, does not require an ad valorem stamp.

Lawes now moved to that effect, and referred to stat. 48 Geo. 3. c. 149. s. 22. and sched. part 1. "Conveyance,"

C 4

whereby

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—
 ROSE
 d. LARKIN,
 against
 CHENHALLS.

whereby an ad valorem duty is imposed upon any conveyance whether grant, &c. upon the sale of any lands, &c., or of any interest in, to, out of, or upon any lands, &c.; and he argued, that a lease of lands, the consideration of which is a sum certain without any rent, or with a pepper-corn rent, is not properly a letting, but a sale of lands, because a letting imports a renting, but in the case put the sum certain is the principal thing, and the rent only nominal; aliter where there is a fine, and also a rent in value, for there the rent is the principal. And that is what is meant by the exemption in the schedule of "Leases for a term absolute in consideration of a fine for the same;" that is, where there is a fine and also a rent. And even in that case, it seems to have been doubted, until stat. 50 G. 3. c. 35. s. 17., whether, where a sum of money was paid or agreed to be paid, a lease could be said to fall within the exemption, or whether it was not a conveyance upon the sale of property.

The Court were of opinion that this was not a sale, but a lease of land upon a fine, within the exemption, and not requiring an ad valorem stamp. And

DAMPIER J. asked if the ad valorem duty was ever paid upon ecclesiastical leases. He said, that he believed it never was, and that the act was drawn with a view to exempt them; if it were not so, the stamp-office must have been negligent in all the numerous instances of ecclesiastical leases since the statute, in not requiring an ad valorem stamp.

Rule refused.

HARTLEY *against* WILKINSON and Another.

Saturday,
April 15th.

ASSUMPSIT by the plaintiff as indorsee, against the defendants as makers of a promissory note. Plea, non assumpsit.

At the trial before Lord *Ellenborough* C.J. at the *Middlesex* sittings after last term, the note produced in evidence was thus:

“ We jointly and severally promise to pay Mr. *Foster*, or order, the sum of twenty-five pounds, being the amount of the purchase money for a quantity of fir belonging to Mr. *Hartley*, and now lying in the parish of *Fillingham*.” Signed by the defendants. Indorsed by *J. F.*

Also indorsed, “ This note is given on condition that if any dispute shall arise between Mr. *Hartley* and Lady *Wray* respecting the fir, the note to be void.”

It was proved that this indorsement was upon the note before the defendants subscribed it; and thereupon it was objected that it was not a negotiable note within the act of parliament (a), and that an action could not be maintained upon it, because the money was not absolutely payable, but it depended upon a contingency whether a dispute should exist between Mr. *H.* and Lady *W.* or not. His lordship being of that opinion directed a nonsuit. (b)

A note promising to pay *J. F.* or order a sum certain, the amount of the purchase-money of a quantity of fir belonging to *H.*, with an indorsement thereon at the time of making the note, that it was given on condition that it should be void if any dispute should arise between *H.* and *W.* respecting the fir, was held not to be a promissory note within stat. 3 & 4 Ann. c. 9.

(a) 3 & 4 Ann. c. 9.

(b) See 4 Campb. N. P. C. 127.

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—
HARTLEY
against
WILKINSON
and Another.

Barnewall now moved to set aside the nonsuit, and took this distinction, that here the note was originally for the payment of money the very moment it was made, and did not depend upon any contingency to make it payable; a right of action upon it vested instant. And therefore this is not like a note which by matter ex post facto is to become a note for payment of money, but being a note in the first instance payable, without waiting any contingency, it differs from any other note only in this respect, that the payment might hereafter have been defeated by a contingency, which contingency has not happened.

LORD ELLENBOROUGH C. J. How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact, in order to ascertain if it be payable? By the indorsement the party takes nothing more than a contingent benefit, dependant upon the happening or not of a particular dispute about the property.

BAYLEY J. This note cannot be said to be payable at all events.

DAMPIER J. The argument is, that a promissory note to pay, "unless a dispute shall arise between *A.* and *B.*" imports an unconditional promise to pay.

Per Curiam,

Rule refused.

1815.

HARRIS and Wife *against* BAKER.Saturday,
April 15th.

CASE against the defendant as clerk to the trustees, under stat. 42 G. 3. c. 101. (a), for making and maintaining, and for watching, lighting, and watering the *Commercial Road*, &c. The plaintiffs declare, that on the 30th *May* 1814 there was a common public highway, called *White Horse-street*, being part of the road mentioned in the said act, yet the trustees, not regarding their duty, wrongfully heaped up a large quantity of dirt by the side of the said highway, near to the plaintiff's house, for a long time, until the wife there fell upon and against the said heap, and thereby one of her arms was broken. 2d Count, for keeping and continuing a quantity of earth and gravel in the said highway, and during the night time, without placing any light or signal at or near such heap of earth and gravel, to denote that the same was there; in consequence of which negligence and improper conduct in the trustees, the wife in the night time of the 30th of *May* fell upon the said heap, and broke one of her arms. Plea, general issue.

The trustees of a public road, who were empowered and required by act of parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch the same, were held not liable in an action upon the case for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings, left on the road-side, after cleansing the road, without any lights.

(a) By stat. 42 G. 3. c. 101., (local and personal,) the trustees are empowered and required, from time to time, to cause such and so many lamp-irons or lamp-posts to be put up along the sides of the said road, or upon the wall or palisade of any house, &c. as they shall think proper; and also to cause such number of lamps to be provided as they should think necessary for lighting the said road. Sect. 82., it shall be lawful for the surveyors, and persons appointed by the trustees, to remove obstructions and abate nuisances. Sect. 104. The trustees are to make contracts for the cleansing the said road. Sect. 115. They are authorized to erect turnpike-gates, and take a night-toll, for the purpose of enabling them to light and watch the road. Sect. 6. The trustees may be sued in the name of their clerk.

At

1815.

HARRIS
against
BAKER.

At the trial before Lord *Ellenborough* C. J. the case, as it appeared upon the statement of the plaintiff's counsel, was thus: the highway in question had been cleansed in the beginning of *May*, and in doing it the labourers heaped the scrapings in round heaps, between two and three feet high, and about two yards asunder, on both sides of the road; and on that side on which the plaintiff's house was, some heaps stood before his house and shop about three feet from the curb-stone, which, from having remained there nearly a month, had become hard, and were stated to be an annoyance to the housekeepers and passengers. In the evening of the 30th of *May*, after it was dark, there being no lamps by the road side, the plaintiff's wife having occasion to cross the way, on her return home fell over one of these heaps, and broke her arm. His Lordship was of opinion upon this case that the trustees were not liable to damages for the injury complained of, they being too far removed from the cause of it; and he directed a nonsuit.

Park now moved for a new trial, upon the ground that the leaving the heaps on the side of the road, without any lamps to light it, was in violation of the duties prescribed to the trustees by the act of parliament, from which a particular injury had accrued to the plaintiffs, and therefore the plaintiffs shall have their remedy for it. And as to the defendants being too far removed from the injury, the rule in such cases is respondeat superior, as the plaintiffs cannot possibly know what hand was the immediate cause of the injury. And so it was ruled in *Matthews v. West London Water Works*
Com-

Company (a); and in *Bush v. Steinman* (b), though *Eyre* C. J. seems to have doubted at first, on account of the remoteness of the persons from the act complained of, whether they were liable in damages for an injury arising from that act, yet he was afterwards satisfied that the action would well lie. Here the clerk being substituted for the trustees, there is no such difficulty as occurred in *Yarborough v. The Bank of England*. (c)

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LORD ELLENBOROUGH C. J. It does not appear by the act of parliament that this action is maintainable against the trustees. The act indeed empowers them to cause such number of lamps to be provided as they shall think necessary: but suppose they did not think it necessary to provide any lamps, can it be said that an action would lie against them upon that account? If by omitting to put up lamps where it is necessary they are guilty of a breach of public duty, they may be indicted for it. But to hold that every trustee of a road is liable in damages for such an accident as this, would, I conceive, be going farther than any case warrants.

LE BLANC J. In *Bush v. Steinman*, the limeburner's servant who committed the nuisance from which the injury arose, was considered as being in the employment of the owner of the house, and working for his benefit, and that the owner was bound to see that those employed by him did not commit any nuisance.

Per Curiam (d),

Rule refused.

(a) 3 *Campb. N.P.C.* 403. (b) 1 *Bos & Pull.* 404.

(c) 16 *East*, 6.

(d) *Dampier* J. had left the court.

1815.

Monday,
April 17th.GOODRIGHT, on the Demise of NICHOLLS,
against MARK.

Lease of lands by indenture for 21 years, with proviso that it should be determinable, by lessee or lessor, at the end of the first 7 or 14 years, and memorandum, indorsed six years after the execution of the lease, "of its being agreed between the parties previously to the execution, that the lessor shall not dispossess nor cause the lessee to be dispossessed of the said estate, but to have it for the term of 21 years from this present time;" which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed: Held that the lessor might, notwithstanding, determine the lease at the end of the first 14 years; for the memorandum did not operate as a new lease and surrender of the first lease.

IN ejectment, tried before *Dampier J.* at the last summer assizes for *Cornwall*, the case was this:

Ann Elford, being seised in fee, by indenture, (4th of *June* 1800,) demised the lands in question to one *Lukey* and the defendant, for 21 years, from *Lady-day* then last, at a yearly rent, and subject to covenants, with a proviso that it should be determinable by the lessees at the end of the first seven or fourteen years, upon twelve months' notice. Upon this indenture, before its execution, and of the same date with the indenture, was indorsed a memorandum, by which it was agreed that the lessor should have the same option of determining the lease as the lessees, upon a like notice. Afterwards, on the 21st of *June* 1806, (*Lukey* being then dead,) the following memorandum was indorsed upon the indenture:

"Memorandum of its being agreed by and between the parties within named, previously to the execution of the within deed, that the said *Ann Elford*, her heirs and assigns, shall not dispossess, nor cause the said *John Mark* to be dispossessed of the said estate, but to have it for the term of 21 years from this present time; dated this 21st *June* 1806. (Signed) *A. Elford*.
J. Mark."

This memorandum was stamped with a lease stamp. In 1812 *A. Elford* died, having devised the lands in fee to

to the lessor of the plaintiff, who, on the 20th of *March* 1813, gave notice to the defendant of her intention to determine the lease at *Lady-day* 1814, and after the expiration of that time brought this ejectment. The defendant rested his defence upon the last memorandum, contending 1st, that it operated as a dispensation by the lessor of the proviso contained in the first memorandum for determining the lease by the lessor, (which it was admitted was to be taken as part of the lease); or 2dly, that it amounted to a new lease to the defendant. The learned Judge ruled upon both points against the defendant; upon the 1st, because otherwise the last memorandum, which was not under seal, would have the effect of a release of that which was under seal, which it could not have; upon the 2d, because it could only be a new lease by operating as a surrender of the former lease, which seemed plainly against the intention of the parties, that a lease without any rent or covenants should be substituted for a lease which contained both. So there was a verdict for the plaintiff.

A rule nisi having been obtained in last *Michaelmas* term for entering a nonsuit, or for a new trial upon these points,

Burrough and *Casberd* now shewed cause, and denied that the memorandum had any force whatever. For considering it as a lease for a farther term, which it purports to be on the face of it, it is absolutely void, because it is a grant of a reversion; and a reversion cannot be granted to pass without deed; for a deed is of the very essence of the grant of a reversion. Therefore the utmost that it can amount to is an agreement which may be operative in a court of equity.

Gifford,

1815.

GOODRIGHT
d. NICHOLLS
against
MARK.

1815.

GOODRIGHT
d. NICHOLLS
against
MARK.

Gifford contra, argued that it was plainly the intention of the parties to the memorandum to give to the lessee an absolute interest in the term, instead of an interest determinable by the lessor, that is, to discharge the power of the lessor to determine it. And though a covenant cannot be discharged but by an instrument under seal, yet it is otherwise with a condition, which the proviso in this case, that the lessor may determine the lease, is. For as conditions may be made and annexed to any estate of a thing grantable without deed, which this term was, without any writing at all (a), so may they be discharged without writing; and therefore a condition broken may be discharged by an act in pais. In like manner the lessor in this case may dispense with the condition in his favour for determining the lease, by an agreement not under seal. But granting that for want of a seal it cannot operate as a discharge, yet if the Court see a plain intention, they will give effect to it in such manner as by law they may. And therefore the agreement shall operate as a demise; the words, "shall not dispossess or cause to be dispossessed, but to have it for 21 years," being sufficient words of demise; and then the taking such new lease will no doubt be a surrender of the former lease, albeit the second lease be by word only, and the first lease be by deed (b). And in that case, the tenant will not hold under the second lease discharged from the rent and covenants, because the tenancy under the second lease will impliedly be subject to the same rent and covenants as in the first.

(a) *Sheph. Touch.* 116. 4th edit.

(b) *Sheph. Touch.* 300. 3 *Bac. Abr. Leases*, (S.) 3. *Dyer*, 140. 2 *Roll. Abr.* 496. pl. 11.

The only difference will be, that the form of remedy will be altered.

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d. NICHOLLS
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The Court considered, that whatever might have been the effect of the memorandum to operate as a surrender of the first lease, if the intention of the parties had been plainly to make a new lease, there was nothing from which such an intention could be collected; on the contrary, the intention was to take away from the lessor the power of determining the first lease, which the parties had not effectually done.

Rule discharged.

WILKINSON, and Others *against* THORLEY and Another.

Tuesday,
April 18th.

SCIRE facias against the defendants to have execution upon a recognizance of bail, for 449*l.* 10*s.* damages and costs, *recovered against Joseph Blount*, sued with *George Kirkham*, by reason of the not performing certain promises made by the said *J. B.* and *G. K.* to the plaintiffs, and the recognizance set forth was a recognizance in 772*l.*, in case the said *J. B.* and *G. K.* should happen to be condemned in the plea aforesaid at the suit of the said plaintiffs, and if the said *J. B.* and *G. K.* should not pay and satisfy unto the plaintiffs all such damages, costs, &c. as should be adjudged to the plaintiffs in the plea aforesaid, or render themselves to the custody of the marshal, &c., and then the plaintiffs allege that *J. B.* and *G. K.* have not paid, &c. nor ren-

In scire facias to have execution for damages and costs recovered against *J. B.* upon a recognizance of bail, conditioned in case the said *J. B.* and *G. K.* should be condemned that *J. B.* and *G. K.* should pay, &c. or render themselves, the plaintiffs allege that *J. B.* and *G. K.* have not paid, &c. or rendered themselves, according to the form and effect of the recognizance:
Held on special

demurrer that the breach was ill assigned; for non constat but that *J. B.*, who was condemned, has paid or rendered.

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dered, &c. according to the form and effect of the said recognizance, &c.

Demurrer, assigning for cause, 1st, that although by the scire facias it appears that the said *J. B.*, against whom the said judgment is therein stated to have been obtained, was sued jointly with *G. K.*, yet it doth not appear by the same why judgment was given separately against the said *J. B.* only; nor is any cause assigned for the said judgment not being against the said *J. B.* and *G. K.* jointly; 2dly, That although by the scire facias it appears that the defendants did by the recognizance bind themselves, in case the said *J. B.* and *G. K.* should happen to be condemned in the plea therein aforesaid at the suit of the plaintiffs, and if the said *J. B.* and *G. K.* should not pay and satisfy unto the plaintiffs all such damages and costs, &c. as should be adjudged to the plaintiffs in the plea aforesaid, or render themselves to the custody of the marshal, &c.; yet it does not appear by the scire facias *that the said J. B. and G. K. were condemned in the said plea*; but, on the contrary, it appears that judgment in the said plea was given against the said *J. B.* only, and not against the said *J. B.* and *G. K.* jointly, according to the said recognizance, and no cause is assigned why judgment was not also given against the said *G. K.* Joinder.

Holroyd, who was in support of the demurrer, admitted that cases might be supposed in which, though *J. B.* and *G. K.* were sued jointly, judgment might be had against one only, as in the instance of the other having become bankrupt and obtained his certificate: wherefore he abandoned the first cause of demurrer. But upon the 2d he argued that the plaintiffs had not
 shewn

shewu any breach of the recognizance; for the condition being in case both should be condemned, and there being no joint condemnation, but a condemnation against one only, consequently the recognizance was not broken. And supposing the condition of the recognizance could be taken as several, that is, "in case either should be condemned," yet the breach was ill assigned, for then it should have been shewn that *J. B.* had not paid or rendered, for if he has so done, the recognizance will be satisfied.

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Marryat, contra., said that the proposition contended for in support of the demurrer, viz. that this recognizance is not forfeited because judgment has passed against one of the principals only, was no less than this, that in all cases a recognizance of bail entered into on behalf of more than one person, is discharged by the death, or bankruptcy and certificate of any one of them; or, in other words, that by whatever means judgment against all may happen to be intercepted, the bail shall be exonerated. But the meaning of such a recognizance is that all such as shall be condemned shall pay or render; but not that all shall be condemned if it be impossible to condemn all. And though the breach is assigned generally that *J. B.* and *G. K.* have not paid nor rendered, it is well enough, because it is in the words of the condition; and there is not any precedent for assigning it in the alternative; but as *J. B.* has only been condemned, it was open to the defendants to have pleaded that he had paid or rendered, and that would have been an answer to the breach that both have not paid or rendered *according to the form and effect of the recognizance*, if the meaning of the

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recognizance be, that the party who is condemned shall pay or render.

LORD ELLENBOROUGH C. J. The rule is that the plaintiff must shew a sufficient breach. And can it be said that the plaintiffs in this case have so done, by alleging that both have not paid or rendered, when it is admitted that the recognizance would be well satisfied by the payment or render of one? Both are to pay or render themselves if they are placed in a situation to pay or render; that is, if both be condemned; but the plaintiffs have only shewn that one has been condemned.

LE BLANC J. If the party against whom judgment has been recovered, has paid the money or rendered himself, that would satisfy the recognizance; and that state of things is consistent with the breach assigned. The plaintiffs have shewn that they recovered judgment against one only: and might they not have gone on and alleged that he had not paid or rendered himself?

BAYLEY J. If the legal effect of the recognizance be in the alternative that both or either, if condemned, should pay or render, I cannot see why the plaintiffs might not have alleged in pleading that neither has paid or rendered. But they have not so done, and they are bound to assign a sufficient breach.

Per Curiam,

Judgment for the Defendants.

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DE SILVALE *against* KENDALL.Tuesday,
April 18th.

ASSUMPSIT for money had and received, and the money counts. Plea, non-assumpsit. At the trial before *Bayley J.*, at the last *Lancashire* summer assizes, there was a verdict for the plaintiff for 192*l.* 9*s.* 10*d.*, subject to the opinion of the Court upon the following case :

By charter-party of affreightment, 2d of *November* 1812, between the defendant as master of the ship *Shannon*, then lying in the port of *Liverpool*, of the one part; and the plaintiff, as merchant, of the other part; the defendant let, and the plaintiff took the said ship to freight, on a voyage from *Liverpool* to *Maranham*, in *South America*, and from thence back to *Liverpool*, upon certain terms and conditions, and upon covenants on the part of the defendant for receiving and delivering an outward and homeward cargo, and for the performance of the voyage; and there was, amongst others, a covenant that the ship should, at the commencement and during the continuance of the voyage, at the expence of her owners, be kept tight, staunch, and strong, and well and sufficiently fitted out, victualled, and manned; in consideration whereof the plaintiff covenanted with the defendant to dispatch the vessel, to load on board of her at *Maranham* a

Covenant by charter-party made between the master of the ship and the freighter, upon a voyage from *Liverpool* to *Maranham*, and thence back to *L.*, that the freighter should pay for the freight from *L.* to *M.* 120*l.*, and from *M.* to *L.* at the rate of 2½*d.* per *lb.* for cotton, which should be delivered at *L.* such freight to be paid as follows, viz. 120*l.* for freight of the outward cargo to *M.*, and as much cash as might be found necessary for the vessel's disbursements in *M.*, to be advanced by the freighter, his agents or assigns, to the master, when required, free from interest and commission, at the current exchange of the place,

and the residue of such freight to be paid on delivery of the cargo in *L.* The ship arrived at *M.*, where the 120*l.* outward freight, and also 192*l.* for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for *L.*, but was lost by capture: Held that the freighter was not entitled to recover back the 192*l.*

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cargo of cotton, and to discharge the same in *Liverpool*, and also that he should and would “pay or cause to be paid unto the defendant *for the freight* and hire of the vessel on the said voyage from *Liverpool* to *Maranham* 120*l.* *British* sterling; and from *Maranham* to *Liverpool* at and after the rate of 2½*d.* *British* sterling per pound weight for each and every pound of cotton which should be delivered at the King’s Beam in *Liverpool*; *such freight* to be paid as follows, viz. 120*l.* *British* sterling for freight of the outward cargo to *Maranham*, and as much cash as may be found necessary for the vessel’s disbursements in *Maranham*, to be advanced by the plaintiff, his agents or assigns, to the defendant, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on the delivery of the cargo in *Liverpool*, in good and approved bills on *London* not exceeding three months date.” The vessel sailed from *Liverpool*, and arrived at *Maranham* with her outward cargo, and delivered it there; when 120*l.*, the sum stipulated by the charter-party to be paid for the freight of the outward cargo, were paid to the defendant by the agents of the plaintiff. The plaintiff’s agents also, on his behalf, paid or advanced to the defendant at *Maranham* 192*l.* 9*s.* 10*d.* for the necessary disbursements of the vessel at *Maranham* as stipulated by the charter-party to be there paid or advanced. The vessel received at *Maranham* from the agents of the plaintiff a homeward cargo, and sailed with it for *Liverpool*; but during the voyage was captured, and, together with her cargo, was wholly lost to the proprietors, and never arrived at *Liverpool*.

The question is, whether the plaintiff is entitled to
recover

recover the 192*l.* 9*s.* 10*d.* so paid or advanced to the defendant at *Maranham*. If he is, the verdict to stand; if not a nonsuit to be entered.

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Richardson argued that the plaintiff was entitled, for that, upon the fair intent of the charter-party, the 192*l.* 9*s.* 10*d.* was to be considered either as a loan, or as an advance of so much of the homeward freight, liable to be refunded if, in the result, no homeward freight should become due. If it was intended as a loan, which it should rather seem to be, from the exemption from interest and commission, else what occasion for any such exemption, then *cadit quæstio*: but if it was intended as an advance of freight, then by the rule of the maritime law, freight being a compensation for the conveyance and delivery of goods, if the conveyance and delivery be not completed, freight is not earned. Which rule is a key to the construction of this covenant, shewing that by an advance of freight must be meant an advance upon an implied condition that the voyage and delivery should be completed, for otherwise it could not be *freight*. And thus in *Mashiter v. Buller* (a), Lord *Ellenborough* C. J. ruled that a stipulation in the bill of lading that the freight should be paid at the shipping port, by no means dispensed with the performance of the voyage. And (the voyage having been lost) he added, that if the defendants had paid the freight upon the shipment, they might have recovered every penny of it back. But in *Andrew v. Moorhouse* (b), where the party elected to contract to pay the freight at the shipping port *at a reduced rate*, in preference to paying it at the port of delivery at a higher rate, it might well

(a) 1 *Campb. N. P. C.* 84.(b) 5 *Taunt.* 435. 1 *Marsh. Rep.* 122.

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be holden that he had waived the benefit of the contingency of the ship's never arriving, having received an equivalent for it in the reduced rate of freight. Therefore that case is very distinguishable from the present, and from *Mashiter v. Buller*. Here the covenant is not that he will advance so much for freight at a reduced rate, but simply for freight; which necessarily imports that sometime or other it shall subsist as freight, though not at the time of the advance; but here it never has subsisted as freight, for *Blakey v. Dixon* (a) decides that a party cannot recover as for freight until the arrival of the goods; and the circumstance of its being to be paid in advance will not take it out of the general rule, if it must still answer the description of freight.

¶ *Littledale*, contra, relied on 2 *Show.* 283. *Anon.*, where it was ruled by *Saunders* C. J., that "advance-money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to the delivering port, yet wages are due according to the proportion of freight paid before, *for the freighters cannot have their money.*" Which resolution is express to shew, that the plaintiff shall not have this money. And doubtless if a man advance his money upon a good consideration he shall not recover it back; as if upon an agreement to build a house, accident by storms excepted, a man stipulate to advance his money for the building from story to story, in consideration of the expence of the builder in procuring materials, &c. and he does so, and afterwards the house, before it

(a) 2 *Bos. & Pull.* 321.

is completed, is blown down, he shall not recover the money back. So here, the freighter stipulates to pay a portion of the freight in advance, in consideration of the ship-owner's expences in preparing the ship for the return voyage, for which the outward freight was not any adequate compensation; wherefore, though the voyage be lost, yet being lost by the perils of the sea, which are excepted, and not by the default of the ship-owner, the freighter shall not recover back what he has so advanced. And *Mashiter v. Buller* was ruled entirely upon the particular words of the contract, viz. "the shippers paying freight for the said goods in *London*," which it was thought only changed the place, but not the time, of payment, and therefore the freight could not be due till the delivery of the goods. But here is a stipulation not only as to place, but also as to the time when the freight shall partially be paid; that is, when the necessary disbursements of the ship were made, and required it. And though *Blakey v. Dixon* decided that upon the strict technical meaning of the word *freight*, that cannot properly be termed freight which is due before the arrival of the goods, yet it was there said that there might be a contract to pay the freight on the delivery of the bill of lading, and that the receiving goods on board to be carried is a good consideration to found a promise to pay the freight immediately. Wherefore if this be in substance a covenant to pay a portion of the freight before-hand, according to *Andrew v. Moorhouse*, the using the word freight shall not, on account of its strict technical meaning, preclude the party from getting at the true meaning of his contract.

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LORD ELLENBOROUGH C.J. By the policy of the law of *England* freight and wages, strictly so called, do not become due until the voyage has been performed. But it is competent to the parties, to a charter-party, to covenant by express stipulations in such manner as to control the general operation of law. The question in this case is whether the parties have not so covenanted by the stipulations of this charter-party. If the charter-party be silent the law will demand a performance of the voyage, for no freight can be due until the voyage be completed. But if the parties have chosen to stipulate by express words, or by words not express but sufficiently intelligible to that end, that a part of the freight (using the word freight) should be paid by anticipation, which should not depend upon the performance of the voyage, may they not so stipulate? Now by this charter-party it is stipulated that 120*l.* shall be paid to the defendant for freight of the outward cargo to *Maranham*, and as much cash as may be found necessary for the ship's disbursements in *Maranham*, to be advanced by the plaintiff, his agents or assigns when required, free from interest and commission, at the current exchange of the place, and the residue of such freight, (impliedly therefore denominating the former payment as an advance of freight, without interest or commission) upon the delivery of the cargo at *Liverpool*. It is argued on one side as if this was a mere loan to provide for the necessary disbursements of the ship at *Maranham*, the money to be advanced indeed at *Maranham*, and to be afterwards repaid by deducting it from the freight, if freight should be earned, but to be repaid at all events whether freight should be earned or not. And I certainly agree that if the charter-party does
not

not import that this was to be a payment in advance, specifically, of freight, the result would be as contended for. But in the first place the advance is to be made free of interest and commission, which shews it not to have been intended as a loan; for if a loan, why should not interest and commission be paid for it? In the next place the word residue imports that it is freight that was to be partially advanced, of which the remainder only was to abide the usual risk which the law casts upon the earning of freight, that is, the conveyance of the cargo to its place of destination. The preceding payment was on the contrary, by the stipulation of the parties not to be subject to that risk, which but for the stipulation and by the ordinary course of law it would have been. And there can be no doubt that the payment of freight may by the agreement of the parties be so exempted. I therefore read this covenant as if it were, that 120*l.* should be paid to the defendant for outward freight at *Maranham*, and that as much more as might be necessary for the ship's disbursements should be advanced by way of freight, and that the residue should remain subject to the contingency of the ship's arrival and delivery of the goods at their place of destination. A part was to be free from all contingency, the residue was to abide the contingency. Thus it appears to me upon the plain meaning of the instrument now before us, and without looking to other cases which apply to different forms of covenanting from the present, that this money was received at *Maranham* as freight, and that it is distinguished by the provision respecting the residue from that part of the freight which was to abide the ordinary contingency imposed by the law. I therefore think

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think that inasmuch as it is freight, the plaintiff is not intitled to recover in this action.

LE BLANC J. I agree to the construction which has been put by my Lord upon this charter-party. The plaintiff has advanced a sum of money to the defendant at *Maranham*, which he now seeks to recover, upon the ground that it was advanced by way of loan, or as a payment by anticipation of freight which was not then nor has ever since been earned. It is open to the parties to such contracts as the present to make such stipulations, consistently with law, as they shall please. And here the parties have contracted for the letting and taking the ship to freight on a voyage to *Maranham* and back to *Liverpool*, and for the payment of a specific sum for the outward freight to *Maranham*, and for the homeward freight they contract to pay according to a specific rate of payment upon the goods to be delivered. But they also contract in what manner this freight shall be paid, that is, that the outward freight, together with so much of the freight home as should be necessary for the disbursements of the ship at *Maranham*, should be paid in advance when required, and the residue of such freight to be paid upon delivery of the homeward cargo at the place of destination. Now there can be no doubt that it is competent to parties to stipulate for part payment of the freight before it can be known whether any freight will accrue or not. And have they not so stipulated by this charter-party? If it was intended that what was advanced at *Maranham* should be returned in the event that has happened, the parties might have provided for it by their contract. That this question has not yet come before the courts can only be accounted for by

by

by supposing that persons have not been advised to attempt the question, because undoubtedly there must have been many cases before this, in which the parties have stipulated for a payment of freight in advance; indeed such cases are very common, and it must very often have happened that the ship has not arrived. And what has happened still more often, is that wages have been stipulated for and paid in advance at a particular period of the voyage, which is similar to the present case, and yet I believe no action has ever been brought to recover back such wages from those capable of paying, on the ground that no freight was earned, and therefore wages were never due. It is impossible to consider this as a loan of money, because of the exception by which it is made free from interest and commission, and because also "the residue of such freight" is made payable upon the ship's arrival. This covenant, therefore, must be understood as a covenant for the payment of the freight in different modes, some part of it upon the arrival of the ship at *Maranham*, and the rest to abide the contingency of the ship's return to her port of destination. It is clear therefore the plaintiff is not entitled to recover.

BAYLEY J. Wherever there is an express stipulation that the party who is to be entitled to freight shall be paid any portion of it in advance, there ought also to be an express stipulation that the party paying it shall be entitled to recover it back, if freight be not earned, if such be the intention of the parties to the instrument. For without some provision of that sort how are we to raise a new implied contract to that effect? It seems clear that the parties to this instrument have stipulated for

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for a partial payment in advance by way of freight and not as a loan; for after settling the amount and rate of freight to be paid for the voyage out and home, they stipulate that *such freight* shall be paid as follows, that is, the outward freight to *Maranham*, and as much cash as should be necessary for the ship's disbursements in *Maranham*, to be advanced by the freighter when required, free from interest and commission at the current exchange of the place, and the *residue of such freight* on the delivery of the homeward cargo. Therefore, taking the whole of the clause together, it seems to me that this payment is to be considered as a payment of so much of the freight in advance. And if that be so, upon what ground is it to be recovered back? It is suggested as a ground, that the freight has failed by the non-performance of the voyage, and thus the plaintiff has derived no benefit from it; but what benefit has the defendant derived? He also has lost as well as the plaintiff, and the question is, whether he is to bear a farther loss. Now in order to maintain money had and received, it is in general incumbent upon the plaintiff to shew that the defendant has money of the plaintiff which in equity and good conscience he ought not to detain from him. But here the question raised is not whether the defendant has money which he ought not to detain, but whether out of his own money he shall be bound to make good that which the plaintiff has lost. It seems to me that the defendant shall not be so bound.

DAMPIER J. It has been argued upon the words of this charter-party, that "as much cash as may be found necessary for the vessel's disbursements in *Maranham*, to be advanced by the plaintiff to the defendant,"

imports a loan of money, and not a payment of freight. And if those words stood alone, and unexplained by the other part of the clause, I should have thought they might have been subject to such a construction. But taking the whole clause together I think it is not so. It stipulates for the payment of *such freight*, that is, the outward and homeward freight; the outward freight and so much cash as should be necessary for the ship's disbursements in *Maranham* to be advanced at the current exchange of the place; and then it adds that the *residue of such freight* shall be paid on the delivery of the cargo. So that it contemplates the whole as freight; and beside, the exemption from interest and commission tends to shew that it was not a loan. I think it impossible therefore upon the whole of this clause to consider this payment as a loan. Then the question is, whether freight *eo nomine* may not be stipulated to be paid in advance; and upon that I think there can be no doubt that it may. As little doubt exists in my mind that this is a stipulation of that nature to pay a portion of the freight in advance, and it does not appear that there is any covenant that the party shall recover it back in the event of freight not being earned. Therefore it does not seem to me that the defendant has received money which he keeps against good conscience. And if so the plaintiff is not entitled to recover.

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Judgment of nonsuit.

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Wednesday,
April 19th.

The KING *against* The Inhabitants of MORTON.

In order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he burnt it long since; and it was also proved that inquiry was made of the executrix of the master, who said that she knew nothing about it: Held that this proof was sufficient to let in parol evidence of the contents of the indenture.

UPON appeal against an order of two justices for the removal of *Elkana Aykroyd*, his wife and children, from the township of *Haworth* to the township of *Morton*, the sessions for the West Riding of *York* confirmed the order, subject to the opinion of this Court upon the following case:

The pauper *Elkana* served one *Boadley* as an apprentice for several years in *Morton*. The indenture was not produced, but in order to shew that the service was performed under an indenture duly executed, and that due diligence had been used to discover it, the township of *Haworth* called a witness, who proved that having heard that the pauper had the indenture, he went to him to inquire what had become of it. The pauper, who was then very ill and died soon afterwards, declared that when the indenture expired it was given to him; that he had it in his possession after the expiration of the apprenticeship, but had burnt it long since, conceiving it of no use. It was also proved by a witness to the execution of the indenture, that there was only one part executed. Proof was also given that inquiry had been made of the daughter and sole executrix of the master, and that she had answered that she knew nothing about it, but no evidence was given of any search having been made by any one, either amongst the papers of the master or those of the pauper. It was objected by the township of *Morton* that sufficient search had not been proved to have been made, or due diligence used, to find the indenture. The sessions

overruled the objection, and the township of *Haworth* then gave parol evidence of the due execution and contents of the indenture, and of the service under it. And the question now made was, whether there was sufficient proof of the loss to let in this parol evidence,

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J. Williams and *E. Alderson*, who opposed the order of sessions, and were called upon by the Court, contended there was not; for that independently of the declarations of the pauper, which ought not to have been admitted, the only evidence was, that inquiry had been made of the executrix of the master, who said she knew nothing about it, whilst all search was negatived among the papers; where, if the indenture existed, it would naturally be. Granting that the declarations of the pauper were evidence so far as to shew that he had not the indenture, which is the utmost that they could be, still, without reasonable evidence of the loss of the indenture, parol evidence of its contents ought not to have been admitted. And *Rex v. Castleton* (a) decided that an inquiry of the representative of the master, and an answer given by her, such as is stated in this case, was insufficient evidence of the loss. Here, therefore, for want of a sufficient search, the proof was defective to let in parol evidence of the contents.

LORD ELLENBOROUGH C. J. The making search, and using due diligence, are terms applicable to some known or probable place, or person, in respect of which diligence may be used. If what the pauper

(a) 6 T. R. 236.

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said, when he was inquired of, was not admissible, then the indenture is not traced into his hands, and being functus officio, there was no particular reason why it should be with him. If, on the other hand, what he said was admissible, then, although it may not amount to proof of the fact that the indenture was destroyed by him, yet it may be so far evidence as to afford a reason why farther search was not made with him. Suppose this had been an inquiry of a merchant for some commercial purpose, and he had given a similar answer, would it not have been sufficient? It is like a non-production upon request, and the party accounts for it. Not that I mean to pronounce that this was evidence of the fact of the indenture having been burnt by the pauper; though there might be some ground for saying that, as the pauper was perfectly free from all interest, he had no bias to make the declaration he did. But without giving it such an effect, it is evidence that such information was obtained as precluded the necessity of any farther search in that quarter, and discharges the parties of any laches in not making it.

LE BLANC J. In *Rex v. Castleton* there was proof of the existence of one part of the indenture; it was traced into the possession of a particular person, and no farther proof was given to shew what had become of it. Here is no proof that the instrument ever existed in the possession of the pauper, unless his declaration is to be taken as evidence; and if it is, we find him declaring in the same breath that it no longer existed. Then follows the application to the executrix of the master, and her answer is, that she knew nothing about

it. It seems to me, therefore, that this evidence shewed that the parties had used reasonable diligence, and that there is nothing in the objection : and I am a little surprised that the Sessions should have thought this a fit subject for a case.

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against
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tants of
MORTON.

BAYLEY J. Application has been made to all parties likely to have or know any thing of the instrument, and no trace of its existence is obtained. Suppose there had been a dozen places at which it might possibly have been traced, would it not have been enough to make inquiry at each, or must the parties have insisted on making search at each? In *Rex v. Castleton* the indenture was traced into the hands of an individual, who, upon inquiry made, did not say that she had not got it, but only that she could not find it.

DAMPIER J. The answer given to the inquiry in *Rex v. Castleton* was a reason why the party should have proceeded to make farther search, because it was proved that the indenture once existed in the hands of the individual, and she did not say that she had it not, but only that she could not find it. But here the reason is all the other way; for when the pauper, by whose information alone the parties were acquainted with his having had the instrument, at the very same time declared that it was burnt, why should they go on to search among his papers? This evidence, therefore, affords a reasonable ground for not pursuing their search with the pauper, whereas the evidence in *Rex v. Castleton* shewed that a farther search was necessary.

Order of Sessions confirmed.

Scarlett was in support of the order.

1815.

Wednesday,
April 19th.

The KING *against* The Inhabitants of YSPYTty.

An order for the removal of a married woman (not stating her to be such) and her children to *Y.*, adjudging that the lawful settlement of her and her children is in *Y.*, was held well without adjudging that *Y.* was her husband's settlement; and proof by the mother of the husband that he gained a settlement in *Y.* by hiring and service was held sufficient without calling the husband, although it appeared that he was in this country.

UPON appeal against an order of two justices, removing *Anne Williams*, her daughter, and son, from *Llandyrnog* to *Yspytty*, in the county of *Denbigh*, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:

The pauper *Anne* is the wife of *Griffith Williams*, a soldier in His Majesty's service at *Woolwich*. The mother of *Griffith* the husband proved that he gained a settlement about 11 years ago in *Yspytty*, by hiring and service, and that he had not to her knowledge gained a settlement elsewhere. This was the only evidence to prove the settlement of the husband, or of the paupers, and no attested copy was produced of the husband's examination upon oath, pursuant to the statute 54 G. 3. c. 25. s. 69., or any other statute. The case set forth the order of removal, which was for the removal of *Anne Williams*, (not stating her to be the wife of any one,) *Jane* her daughter, aged three years, and *Griffith* her son, aged two years; adjudging that the lawful settlement of the said *Anne* and her children (not that the settlement of her husband) was in *Yspytty*.

Peake, in support of the order of Sessions, relied on *Rex v. Bucklebury (a)*, to shew that the order was well enough in point of form, although it did not state that *Yspytty* was the settlement of the husband.

(a) 1 T. R. 164.

Gurney,

Gurney, contra, took another objection, viz. that the evidence of the mother to prove the settlement of the son, when it appeared the son himself might have been called to prove it, was not the best evidence.

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against
The Inhabitants of
Ysnyrrt

Lord ELLENBOROUGH C. J. If the respondent parish prove enough to launch a *prima facie* case of settlement, is it necessary that they should prove more? Must they go on to call witnesses at the hazard of having that which is already proved defeated? As to the objection upon the form of the order, it is stated that it is the wife's settlement, and the medium through which she became settled there need not be stated. (a)

Per Curiam, Order of Sessions confirmed.

(a) See *Rex v. Higber Walton*, Burr. S. C. 162.

ELIZABETH KINGDON *against* NOTTLE.

Friday,
April 21st.

COVENANT by the plaintiff as devisee of *Richard Kingdon*; and the plaintiff declares that by indentures of lease and release of the 11th and 12th. of May 1780, the defendant conveyed to *R. Kingdon* in fee a fourth part of certain lands therein particularly described, with a proviso for redemption upon payment of 450*l.*; and that the defendant covenanted for himself, his heirs, executors, and administrators, with *R. Kingdon*, that he the defendant was at the time of the execution of the indenture seised of and in the pre-

Covenant lies by devisee of lands in fee upon a covenant made by defendant to the testator, to whom defendant conveyed the lands in fee, that defendant was lawfully seised, &c. and had a good right to convey, &c.; for such covenant runs with the land, and tho' broken in the

lifetime of testator, is a continuing breach in the time of the devisee, and it is sufficient to allege for damage that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously.

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KINGDON
against
NOTTLE.

mises of a good and indefeasible estate of inheritance in fee-simple; and that he had good right to convey the same to *R. Kingdon* and his heirs; and then the plaintiff avers that *R. Kingdon*, on the 3d of *May* 1791, duly made his will, &c., and thereby devised the same premises to her in fee, and died seised, and that she (the plaintiff) entered into the premises, and became and was and continually hath been possessed thereof, and seised of and entitled to all such estate and interest of and in the same as *R. Kingdon* had in his lifetime, and at the time of his death, and assigns for breach, 1st, That the defendant, at the time of the execution of the indenture, was not seised, &c.; 2dly, That he had not good right to convey to *R. Kingdon* and his heirs, &c. And so the plaintiff says, that by reason thereof the premises are of much less value, to wit, less by 2000*l.* to the plaintiff than they otherwise would be, and that she hath not been able to sell, and hath been prevented and hindered from selling the same, for so large a price or so beneficially and advantageously as she otherwise might have done. And so she saith that the defendant hath not kept his covenant so made with *R. Kingdon*, but to keep the same with *R. Kingdon* in his lifetime, and the plaintiff, since his death, hath wholly refused.

Demurrer assigning for cause, 1st, That it appears by the declaration that the supposed breaches of covenant therein assigned were committed in the lifetime of *R. K.*, before the plaintiff had any estate or interest in the premises; and also, that it does not appear by the declaration that *R. K.* was at any time disturbed or interrupted in the enjoyment of the premises by the defendant or any other person, or sustained or could

could have sustained any damage by the same supposed breaches of covenant or either of them, and also for that it is not alleged that the plaintiff hath at any time since the death of *R. K.* been interrupted or disturbed in the enjoyment of the premises, or any part thereof, or hath sustained any damage from the supposed breaches of covenant or either of them; and also that it does not appear that any person hath refused to purchase the premises on account of the supposed breaches of covenant, and also that the allegations that the premises are of much less value than they otherwise would be, and that the plaintiff hath not been able to sell, and hath been prevented and hindered from selling the same for so large a price or so beneficially and advantageously as she otherwise might have done, are too general, and do not give the defendant sufficient notice of the supposed damage.

Joinder.

Gifford, in support of the demurrer, contended, 1st, That the plaintiff could not have this action by reason that the breach was incurred in the lifetime of the devisor; whereas the devisee, who is but assignee of the land, can only have covenant for a breach incurred in her own time; 2dly, Granting that the plaintiff, if she had shewn sufficient special damage, might have maintained this action; yet here she has not shewn it. 1st, It has already been resolved in this case (*a*), that the action does not lie for the executrix; the reason of which is, that this being a covenant real, in order to entitle the executrix there must be both a breach and a

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(a) *Kingdon v. Nottle*, ante, vol. i. 355.

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damage in the lifetime of the testator, as was the case of *Lucy v. Levington* (a), otherwise it shall go to the heir or the assignee of the land; whence it may at first seem as if the devisee in this case, being assignee, ought to have the action. But if the breach be in the testator's lifetime, it is not capable of being assigned; the covenant indeed will pass with the land, but not the breach of it (b); and if the breach cannot be assigned, how shall the plaintiff as assignee maintain covenant? Now that the covenant was broken in the testator's lifetime is plain from *Shep. Touch.* 170., which says, "that if one doth covenant that he is lawfully seised in fee, or that he hath a good estate, &c. and he hath not, in this case the covenant is broken as soon as it is made." And though in *King v. Jones* (c) the heir was allowed to maintain covenant upon a breach incurred with the ancestor, yet that was because the heir represents the ancestor in respect of land, as the executor does in respect of personalty, and therefore what the ancestor might have the heir shall have: but that is different with the assignee. Besides, in that case the ultimate damage was sustained in the time of the heir, and was specially alleged, namely, that the heir was evicted: but here nothing is alleged for damage, which might not have been alleged in the testator's lifetime; therefore upon the second ground also the plaintiff is not entitled to maintain this action.

Lord ELLENBOROUGH C.J. The rule with respect to the executor's right to sue upon breaches of contract made with the testator was considered in the former

(a) 2 Lev. 26. 1 Vent. 175. S. C. (b) *Lewis v. Ridge*, Cro. Car. 863.
(c) 5 Taunt. 418. 1 Marsh. R. 107. S. C.

case of *Kingdon v. Nottle* as subject to some qualification; and in a still more recent case (a), it was considered that he could only recover in respect of such breach as was a damage to the personal estate. But here the covenant passes with the land to the devisee, and has been broken in the time of the devisee; for so long as the defendant has not a good title, there is a continuing breach; and it is not like a covenant to do an act of solitary performance, which, not being done, the covenant is broken once for all, but is in the nature of a covenant to do a thing toties quoties, as the exigency of the case may require. Here, according to the letter, there was a breach in the testator's lifetime; but according to the spirit, the substantial breach is in the time of the devisee, for she has thereby lost the fruit of the covenant in not being able to dispose of the estate.

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LE BLANC J. If the covenant is to cease with the breach of it, then if it be broken, and the covenantee die immediately after, the covenant will be gone; and yet the injury arising from the breach would accrue altogether to the devisee.

DARRELL J. This is a covenant which runs with the land; but if it may be broken but once, and ceases eo instanti that it is broken, how can it be a covenant which runs with the land?

Per Curiam, Judgment for the Plaintiff.

Bayly was to have argued for the plaintiff.

(a) *Ante*, vol. ii. 498. *Chamberlain v. Williamson*.

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Friday,
April 21st.FENNY, on the Demise of JOHN COLLINGS,
against EWESTACE.

Devise, 1st, to my wife all my goods, &c. to her and her heirs, *also* three cow-commons to her and her heirs; 2dly, to my two nephews all that piece of land called, &c., *also* to my nephews all that piece of land called, &c. as tenants in common, and to their several heirs and assigns for ever; 3dly, "I give to J. C. all that my house and premises at P. I *also* give to J. C. all that my land in P. and R. to him, his heirs and assigns for ever." Held that J. C. took a fee in the house and premises as well as in the land.

JOHN COLLYER being seised in fee, &c. by his will devised, "FIRST, To his wife all his household goods, &c. to her and her heirs for ever; *also* he gave to his wife three cow-commons to her and her heirs for ever; 2dly, To his two nephews, *John* and *Thomas Collings*, all that piece of land called *Priestlands*, *also* he gave to his nephews *J.* and *T. Collings*, all that piece of land called *Longland*, to be equally divided between them as tenants in common, and to their several heirs and assigns for ever: "3dly, (he devised) *I give unto my nephew John Collyer all that my house and premises at Pitston, in the occupation of R. Read; I also give unto my nephew John Collyer all that my land in the parishes of Piddleston and Aubury, in the occupation of J. Tompkins, to him my said nephew John Collyer, his heirs and assigns for ever.*" 4thly, He gave to his brother *F. Collyer* one shilling a-week for his life, for the payment of which he charged the house and premises in the occupation of *R. Read*. And all the rest and residue of his real and personal estate he gave unto his nephew *J. Collings* and his nephew *J. Collyer*, to be divided equally between them, after paying his debts and funeral expences. And he appointed them joint executors.

The testator died, and *John Collyer*, his nephew and also his heir-at-law, died. And upon a case reserved at the trial of this ejectment for the house and premises at *Pitston*, the question was, what estate *J. Collyer* took under the devise. If the Court should be of opinion that

that he took only an estate for life, then judgment to be entered for the plaintiff for a moiety of the premises; If they should be of opinion that he took an estate in fee, then judgment to be entered for the defendant.

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 EWESTACE.

Preston argued that he took but an estate for life. And that, he said, was the plain construction of the 3d clause of this will, which contained two separate and independent branches of devise; whence it followed that the words of inheritance in the last branch were to be confined to that branch, and not taken to enlarge the devise in the first branch. And there can be no reason for joining the two branches, because both are perfect and sensible in themselves; and the word *also*, with which the second branch is commenced, rather denotes a disjunctive than a copulative; or, according to the opinion of the Court in *Spirt v. Bence* (a), "it is no more than the word *and*, and shall not extend to the quantity of the estate, but to the clause following." And therefore where the devise ran thus: "Item, I give to my son *H.* my pastures, *also* I will that all bargains, &c. which I have from *N. B.* my son *H.* shall enjoy and his heirs for ever," &c.; it was held that *H.* should have but an estate for life in the pastures. So in *Hopewell v. Acland* (b), where the devise was, "*Item*, I devise my manor of *B.* to *A.* and his heirs. *Item*, I devise all my lands, tenements, and hereditaments to the said *A.*:" it was contended that the *item* conjoined the sentences, and carried on the testator's intent to give the like estate in the lands, tenements, and hereditaments, as was before expressed in the precedent

(a) *Cra. Car.* 368.(b) 1 *Salk.* 239.

sentence.

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sentence. But per *Trevor C. J.* “*Item* is an usual word in a will to introduce new distinct matter; therefore a clause thus introduced is not influenced by, nor to influence, a precedent or subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore not here, where both clauses are perfect and sensible.” Which reasoning of *Trevor C. J.* is very material to the principal case, and may also serve as an answer to what fell from Lord *Hardwicke* in *Cheeseman v. Partridge* (a). So, in *Doe v. Wright* (b), a devise “to *J. W.* of all his lands, freehold, copyhold, and leasehold, in *A.*; also to *J. W.* of all his estate, freehold and copyhold, in *B.*;” was held to be a life-estate only in the lands in *A.*, for that the two clauses could not be connected.

Lord ELLENBOROUGH C. J. Undoubtedly if there be nothing in the context to connect the different clauses of a will together, they must be taken separately; but does not the arrangement in this will point out the connection which the testator intended; namely, a numerical order, connection, and division, between the several clauses of the will. In some of the clauses, he reserves the main sense in respect of the quantum of interest to the last; he says he gives such lands to the particular devisee, and also such lands, and then at the last he states what the quantum of interest is that he gives. This is a question for a grammarian rather than a lawyer, or which a schoolmaster might decide as well as a Judge. If it had not been for the numerical arrangement there might have been some difficulty,

(a) 1 Atk. 436.

(b) 8 T.R. 64.

but

but that removes it. It seems clear from the context that both in the second and third clause the testator, by reserving to the close of the entire sentence the words of limitation, meant to accumulate and comprehend within those words all that he had disposed of in the preceding parts of the sentence. Therefore it appears to me that *J. Collyer* took under this devise an estate in fee.

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against
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LE BLANC J. I think the numerical divisions clearly shew, that by the phraseology which the testator has used both in the 2d and 3d clauses, he meant to describe, first the persons and the property which were the subject of his devise, and to wait until the end to point out the estate he devised.

BAYLEY J. According to the argument for the plaintiff, the two *Collings's* named in the 2d clause would take only a life-estate in *Priestlands*, but a fee in the other land.

Per Curiam, Judgment for the Defendant.

Blosset Serjt. was to have argued for the defendant.

DANSEY *against* GRIFFITHS.

Tuesday,
April 25th

RICHARD DANSEY, the plaintiff's father, being seised in fee, by his will, dated the 31st day of March 1813, devised to his eldest son, *Dansey Richard*

Devise of lands to *R. D.*, his eldest son, and his heirs; but if it should happen that

R. D. should die and leave no issue, then to his son *W. D.* and his heirs; and if he should die without issue, then to his son *E. D.* &c.: Held that *R. D.* took an estate tail.

Dansey,

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—
DANSEY
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GRIFFITHS.

Dansey, and his heirs for ever, all his estates, lands, houses, coppices, tithes, and premises, with the manors, &c. (describing them), and all his stock and personal property whatever, to enable him to pay all his debts and legacies before bequeathed, *but if it should so happen that his eldest son D. R. Dansey should die and leave no issue*, then he gave all his aforesaid manors and estates unto his son *W. Dansey* and his heirs, *and if he should die without issue*, then to his son *E. C. D.*, and in the like case to his son *G. H. D.*, and in like case to his son *J. D.*, and *in failure of issue from him*, to the eldest surviving son of his sister *Mary Johnson* and his heirs, &c. The testator died leaving the plaintiff, *D. R. Dansey*, his eldest son, him surviving.

The question directed by the Master of the Rolls for the opinion of this Court was, what estate *D. R. Dansey* took in the said estates by the will.

Benyon, for the plaintiff, on a former day argued that he took an estate in tail general. And he said the rule was now settled, though it had formerly been doubted, that where lands of inheritance are devised to one, or to one and his heirs, and *if he die without issue*, then to another, that is an estate tail; and the reason is, that the subsequent words, “if he die without issue,” shall either reduce or enlarge his estate to an estate tail (a), because they are supposed to be inserted in favour of the issue, that they shall have it; and the intent shall take place. And the same rule holds whether the words be *if he die without issue*, or whether they be *if he die and leave no issue*; for as to the freehold the

(a) See per *Willes C. J.*, *Willes, R.* 3.

construction shall be, if he die without issue *generally*, by which there may be *at any time* a failure of issue; though as to the personal estate it is different, for there the same words shall be construed to mean a dying without *leaving* issue at *his death*; the reason of which difference in the case of personalty is, in order to support the devise over, which otherwise would be too remote. And for all this he cited *Forth v. Chapman* (a), *Atkinson v. Hutchinson* (b), *Southby v. Stonehouse* (c), *Earl of Stafford v. Buckley* (d), *Exel v. Wallace* (e), *Read v. Snell* (f), *Sheffield v. Lord Orrery* (g). And though in *Porter v. Bradley* (h) Lord Kenyon expressed himself dissatisfied with this difference of construction, as applied to the different kinds of property, saying that *leaving no issue* must be restrained to *leaving issue at the time of his death*, as well in the case of realty as chattel interests, and not to mean *an indefinite failure of issue*, yet it seems in a subsequent case (i) he admitted the distinction; and in *Crooke v. De Vandes* (k) Lord Eldon observed that the dictum of Lord Kenyon in *Porter v. Bradley* went to shake settled rules to their very foundation, and that he had heard the case of *Forth v. Chapman* cited for years, and repeatedly by Lord Kenyon himself, as not to be shaken (l). It is true that in *Roe v. Jeffery* (m) a devise much like the present was adjudged to be a devise of the fee with an executory devise over; but that was so adjudged upon the intention, as it was collected from the whole will,

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 DANSEY
 against
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(a) 1 P. W. 663.

(b) 3 P. W. 261.

(c) 2 Ves. 615.

(d) Ibid. 180.

(e) Ibid. 120.

(f) 2 Atk. 646.

(g) 3 Atk. 288.

(h) 3 T. R. 143.

(i) *Daintry v. Daintry*, 6 T. R. 314.

(k) 9 Ves. 203.

(l) See *Roe v. Jeffery*, per Lord Kenyon, 7 T. R. 595.

(m) 7 T. R. 589.

that.

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that the failure of issue intended by the testator was to be a failure of issue at the death of the first taker, and particularly so, because the persons to whom the remainder over was given were then in existence, and only life estates were given to them. But *Tenny v. Agar* (a) is an express decision that a devise to a man's son and his heirs, and in case his son and daughter should both die without leaving any child or issue, then over, is an estate tail. And if this construction wanted any confirmation, it might be observed that here the limitation over is to the next brother of the devisee, who would be his heir if he died without issue (b), which shews that the testator, by the devise to him and his heirs, meant heirs of his body, because he could not die without heirs so long as his next brother existed. And the remainder over to the younger sons are clearly estates tail. (c)

Abbott, contra, contended that the plaintiff took a fee defeasible by the event of his dying without issue living at the time of his death. And he said that in *Forth v. Chapman*, and most of the cases cited contra, where the subsequent words, on which the remainder over was limited, were held to give an estate tail to the first taker, the estate was limited to the first taker indefinitely, and not, as here, by words of inheritance. But in *Roe v. Jeffery*, where the estate was given to the first devisee and his heirs for ever, and the remainder over was upon a dying and leaving no issue, which is the very case at bar, the first estate was adjudged to be a fee, and the remainder over to be good by way of

(a) 12 East, 253.

(b) Willes, R. 3. *Brice v. Smith*.(c) 5 Mod. 266. *Leigh v. Bracc*.

executory devise; and it does not appear by that case that any particular reliance was had upon the remainder over being to persons in esse, and for life only. *Porter v. Bradley* was a prior resolution to the same effect; and so in *Doe v. Wetton* (a) the devise in fee to the first taker was held not to be restrained by the subsequent words to an estate tail. *Tenny v. Agar* was decided upon its own particular intent, viz. that the son should not take such an estate, as that, supposing him to have died without issue, and the daughter to have lived and had issue, he could have devised away the estate from the daughter and her issue to a stranger. But there is nothing inconsistent in supposing that this testator meant that his son should take a fee, because, as far as the issue is concerned, their interest would be no better protected by giving him an estate tail; but the interest of the remainder-man will be better protected if he takes a fee with an executory devise over; because he cannot bar the executory devise.

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 ———
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Cur. adv. vult.

The following certificate was sent :

WE have heard this case argued by counsel, and have considered it; and we are of opinion that *Dansey Richard Dansey* took an estate in tail general in the said estates under the said will.

ELLENBOROUGH.
 S. LE BLANC.
 J. BAYLEY.
 H. DAMPIER.

April 25. 1815.

(a) 2 Bos. & Pul. 324.

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Tuesday,
April 25th.NEWMAN, Executrix of H. NEWMAN, against
NEWMAN.

In debt on bond, conditioned for the performance of several things, if one of them be void at the common law, yet the bond may be good for the others; as where it was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, and to present him: Held that admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet the bond was good for the payment of the money.

IN debt on bond, dated the 13th of *May* 1780, for 14,000*l.*, made by the defendant, son of *H. Newman* the testator, to the said *H. N.*, the condition recited that by the will of one *N.* deceased, the said *H. N.* (the testator) had an estate for life expectant upon the death of *F. Newman* his brother, without issue male, in certain manors, lands, &c. in *North* and *South Cadbury* and *Sparkford* in the county of *Somerset*, and that the defendant who had married the daughter of *F. N.* was remainder-man in tail, and that it had been agreed between the said *F. N.* who had no issue male, *H. N.* and the defendant, that a common recovery should be suffered in order to bar all estates tail, and that the defendant and *H. N.* had agreed that by the deed to lead the uses, the estate of *H. N.* should be vested in the defendant and his heirs, &c., and that the defendant should pay on or before the 13th of *December* next to *H. N.* 1000*l.*, and 7500*l.*, within six months after the death of *F. N.*, and that in case the benefices or livings of the parish churches of *South Cadbury* and *Sparkford*, or either of them, should at any time thereafter become vacant during the joint lives of the defendant and *Edwin Newman* his brother, then a minor, and if at the time of such vacancy the defendant should be entitled to the right of presentation, and the said *Edwin* should then be qualified to be presented and admitted, he (the defendant) would present the said *Edwin* to supply such vacancy, and to be the rector of the said benefice, or if

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at the time of such vacancy the said *Edwin* by reason of nonage should not be qualified to be presented, and should not be qualified within six calendar months next after such vacancy, so that it would be necessary for the defendant to present some other person to prevent a lapse, then the defendant would upon the request of the said *Edwin*, or upon notice in writing given to the defendant by the said *Edwin*, at any time after he should be qualified to be presented and admitted, procure the then incumbent to resign the said rectory into the hands of the ordinary, so that the same might again become vacant, and thereupon the defendant should present the said *Edwin* to be rector: and the condition was for the performance of these several things agreed to be done by the defendant. And all this appearing upon oyer of the bond and condition, the defendant pleaded that before and at the time of making the said writing obligatory *F. N.* was seised of the said manors, &c. to which the advowsons of the churches of *South Cadbury* and *Sparkford* respectively belonged, &c., (as in the condition of the bond) and that the agreement in respect of the several things agreed to be done by the defendant was simoniacal, whereby the said writing obligatory is wholly void. Demurrer. Joinder.

Gaselee in support of the demurrer made two points, 1st, that the condition for the next presentation of the obligee's son was not simoniacal; 2dly, that if it was, yet the bond was only void for so much, but was good for the residue. 1st, What is laid down in several of the text writers, and particularly in (a) *Cunningham*,

(a) *Law of Simony*, 26.

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 NEWMAN
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that the buying of the next presentation to a church when it is full, with intent to present a *certain* person when it shall become void, and the presenting of that person, is an offence within the statute, is contrary to the authorities, and rests only upon an erroneous citation of the case of *Calvert v. Parkinson* in *Noy*, 25., whereas it appears from the report of that case (a) *that the parsonage was actually void at the time* by the death of the incumbent. Such also was the case of *Baker v. Rogers* (b). And in *Winchcomb v. Pulleston* (c), where the contract was holden to be simoniacal, the incumbent was *in extremis*, and the agreement was *with the clerk himself*; and in another report of the same case (d), it is said, that “2 Jac. was vouched, that if a father purchase the next avoidance, and present his son after the death of the incumbent, that is not simony, and it was accordingly adjudged 42 & 43 Eliz.” Which appears to have been the case of *Smith v. Shelborn* (e), where the parson being sick, a father came with his son to the patron, and contracted with the patron *in the presence of his son* for the next avoidance, and agreed to give him 100*l.* for it, who thereupon made a grant, &c. And in prohibition, all the justices, beside *Anderson*, held that there was not any simony, for the father might buy the advowson and present his son. And although the son was privy, yet it was not material, for being no offence in the father, who was the principal, it cannot be an offence in the son who was accessory. But *Anderson* held that a consultation should be granted, because being with the son’s privy made it simony in him, yet (he added) *if it had been without his privy it had not*

(a) *Lane*, 72.(d) *Noy*, 25.(b) *Cro. Eliz.* 789.(e) *Cro. Eliz.* 685.(c) *Hob.* 165.

been

been simony. So that here is the authority of the whole Court, that if the son is not privy, there is no simony. Also *Com. Dig.* (a), “it is not a simoniacal contract if a father contract for the next avoidance for his son without his privy;” for which *Moor.* 916. is cited. So in *Johns v. Lawrence* (b), a bond to resign within three months after request, and in *Partridge v. Whiston* (c), a bond to resign on three months’ notice, *in favour of the plaintiff’s son*, were adjudged well. And the only authorities contra are *Godb.* 390. 435., which are anonymous, and for which no reference is made to any case. 2dly, This is a divisible contract, so that if one part be void the Court may enforce that part which is good. For there is a known distinction in this respect between contracts that are void by the common law, and such as are void by statute. Thus in *Fetherston v. Hutchinson* (d), upon a promise to a bailiff to pay the debt in consideration of his letting his prisoner go at large, and of 2s. paid to the defendant, it was moved that it was contrary to stat. 23 *H. 6.*; and though it be joined with another consideration of 2s., yet being void and against the statute for part, it is void in all. But in *Norton v. Simmes* (e) a difference was taken between a bond made void by statute and by the common law, for a statute is a strict law, but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand. So *Pigot’s case* (f), “if some of the covenants of an indenture be against law, and some lawful, the first are void, and the others stand good.” And upon the authority

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(a) *Esglise*, N 3.(b) *Cra. J.* 248. 274.(c) 4 *T. R.* 359.(d) *Cro. Eliz.* 199.(e) *Hob.* 14.(f) 11 *Rep.* 27. b.

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of these cases it was lately adjudged in *Greenwood v. The Bishop of London* (a), that a conveyance of an advowson, admitting it to be void for the next presentation by reason of simony, was good for the remaining interest, which might fairly be separated from the objectionable part.

Marryat contra, argued that this condition for the presentation of a person *in certain* upon the next avoidance, or whenever he should be capable to take it, was simoniacal. And he denied that the language of the text writers was at variance with the authorities. Some of them indeed make a special exception in favour of a son, because of the natural obligation of the father to make provision for him; but the statute (b) is general and makes no such exception. And in *Johns v. Lawrence*, if the bond had been averred in pleading to be simoniacal, instead of being objected to in arrest of judgment, the decision might have been the other way; or if not, it must be remembered that at that time, and until *The Bishop of London v. Ffytche* (c), all bonds of resignation were understood to be lawful.

LORD ELLENBOROUGH C.J. What the effect of a bond of resignation in favour of a son might be, was not I believe touched upon in *The Bishop of London v. Ffytche*; though perhaps it might be argued that there is no reason for any distinction, because a parent would be more open to prejudice and improper bias in favour of a son than of any other person. But admitting the condition of this bond to be ill as to one part of it, it

(a) 5 Taunt. 727. 1 Marsh. R. 292.

(b) 31 Eliz. c. 6. s. 5.

(c) See *Cunningham, Law of Simony*, 52.

seems that it may be well as to the other parts; for you may separate at the common law the bad from the good. Supposing therefore we held it to be simoniacal so far as it regards the presentation of the son of the obligee, yet for the payment of the two sums of 1000*l.* and 7500*l.* it is exempt from all vice. Therefore that objection would not be a bar to this action.

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LE BLANC J. The reason for making an exception in favour of a condition for presenting a son, might be, because it was not for a money consideration.

DAMPIER J. If a bond to resign in favour of a particular person were necessarily void, the objection would have been good in *Johns v. Lawrence*. But a stipulation to resign in favour of a specified person does not seem to be open to the same objection as if it were to resign generally, because the latter makes the incumbent but a mere tenant at will to the patron. I know that since the case of *The Bishop of London v. Fytche* it has been considered that bonds of resignation in favour of specified persons are not illegal.

Per Curiam, Judgment for the Plaintiff.

The KING *against* Cock.

Thursday,
April 27th.

THE defendant having been convicted at the last *Cornwall* assizes upon an indictment found at the quarter sessions, and removed into this court, for lighting fires upon the coast contrary to stat. 47 G. 3. sess. 2.

An indictment lies to the quarter sessions for lighting fires on the coast contrary to stat. 47 G. 3. Sess. 2. c. 66., and if it

be removed and the defendant be tried and convicted before a Judge at Nisi Prius, this Court shall award sentence.

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c. 66. now appeared to receive judgment. Whereupon *Gifford* on his behalf referred to sect. 34. which enacts, that “offenders shall be carried before one or more justices, who shall commit them to the next county gaol, there to remain *until the next court of oyer and terminer, great session, or gaol delivery*, and in case an indictment shall be found, he shall forthwith plead and be tried without traverse, and being duly convicted shall, by order of the *Court before whom he shall be convicted*, either forfeit or pay the penalty of 100*l.*, or at the discretion of *such Court* be sentenced to or committed to the county gaol, or house of correction, there to be kept to hard labour for not exceeding one year.” And because the words were “until the next court of oyer and terminer, great session, or gaol delivery,” without naming the quarter sessions, he suggested a doubt whether this indictment was well originated; yet he admitted that as by sect. 36. the recognizance to be taken in case the offender should be admitted to bail, was to be with a condition to appear at the next court of oyer and terminer, gaol delivery, great session, or *general quarter sessions*, to answer to any indictment which may be there found, the omission in the former section seemed clearly a mistake. He also took another objection, that by the words of the statute the defendant ought to have been sentenced by the Judge at nisi prius, that is, *the Court before whom he was convicted*, and not now by this Court; in like manner as in *Rex v. Inhabitants of Chadderton* (a) it was held upon similar words in stat. 13 G. 3. c. 78. (highway act) that costs must be awarded by the Judge at the trial, and not by this Court.

(a) 5 T. R. 272.

But,

But, *per Curiam*, upon the first point, the statute makes this a misdemeanour. And suppose the offender is never apprehended or committed at all, may he not be indicted for it; and if he may, what is there to shew in that case that it may not be done at the quarter sessions? And upon the second they mentioned a former instance where sentence had been passed by the Court upon two persons convicted under this act; and the words *before whom he shall be convicted*, mean before whom judgment is given.

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The defendant was sentenced to two months' imprisonment in the county gaol, to be kept to hard labour. (a)

(a) See *Rex v. Read*, 16 East, 404.

The KING *against* VANTANDILLO.

Thursday,
April 27th.

THE defendant was indicted for carrying her child while infected with the small pox along a public highway. The indictment charged, that on the 20th of April, in the 54th year of the King, *John Vantandillo*, an infant of about the age of one year, was infected with a contagious, infectious, and dangerous disease and sickness, called the small pox, at, &c.: that the defendant, the mother of the said *J. V.*, well knowing the premises, afterwards, and whilst the said *J. V.* was so infected, on, &c. with force and arms at, &c. unlawfully and injuriously did take and carry the said *J. V.* into and along a certain open public way and passage called, &c. used for all the king's subjects on foot, in which public way and passage there were divers liege subjects, and near

A person may be indicted for unlawfully and injuriously carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects.

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near unto and by divers dwelling-houses, habitations, and residences of divers liege subjects then and there dwelling, inhabiting, and residing, and into a certain common highway situate in, &c. used for all the king's subjects on foot, and with horses, coaches, carts, and carriages, &c. in and along which said common highway divers liege subjects were then going, returning, passing, riding, and labouring, and amidst and among divers liege subjects who were then and there in the said common highway, and had met and assembled together. There were other counts, and the indictment concluded, "to the great danger of infecting with the said contagious, infectious, and dangerous disease and sickness, called the small pox, all the liege subjects who on the said days and times were in and near the said public way and passage, dwelling-houses, habitations, residences, and common highway, and who had not had the said disease and sickness, to the damage and common nuisance of all the said liege subjects, to the evil example of all other persons in like cases offending, and against the peace," &c.

And now, the defendant having suffered judgment by default, appeared to receive the sentence of the Court.

Owen moved in arrest of judgment, that this was an indictment of the first impression. He observed, that the defendant was not indicted for inoculating, or causing the child to be inoculated with an infectious disease; for it is not stated how the child came by it. And it is consistent with this indictment that the child might have caught the disease; and supposing it had, might not the mother carry it through the street in order to procure medical advice without being subject to be indicted for

it? Therefore the indictment ought to have shewn that the act was unlawful; and it ought also to have alleged that there was some sore upon the child at the time when it was so carried, by analogy to the writ "*de leproso amovendo*," which, it seems, lay only for those who appeared to the sight of all men by their voice and sores to be lepers, and not for those infected with the disease, but not outwardly in their bodies (*a*). And if the merely alleging that the disorder is infectious and dangerous to the subjects, be sufficient, there is a multitude of diseases, of which the same may be predicated, and consequently the patient during the continuance of any such disease must never go abroad at all; so difficult will it be to draw the line. The only offences against the public health of which *Hawkins* speaks, are spreading the plague and neglecting quarantine (*b*); and Lord *Hardwicke*, it appears, thought the building of a house for the reception of patients inoculated with the small pox was not a public nuisance, and mentioned that upon an indictment of that kind there had lately been an acquittal. And he added, that the fears of mankind, though they may be reasonable, will not create a nuisance. (*c*)

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Park and *Gurney* contra mentioned the circumstance of a bill having been introduced into parliament during the last sessions, for the purpose of subjecting this offence to a punishment, and that it had been rejected upon the ground (then suggested by the law officers) that it would restrain the common law proceeding; upon which occasion it was taken for granted, that to carry

(*a*) See *Fitz. N. B.* 534. (*b*) *Hawk. P. C. c.* 52, 53. (*c*) 3 *Atk.* 750.

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infected persons about the streets of *London* was an indictable offence. And Lord *Hale* expressly mentions the small pox as one of those contagious diseases, which if a man be infected with, and goes abroad, whereby another be infected and dies, it is a great misdemeanour in him (a). Considering the circumstances of this case, it would be difficult to find a more fit subject for prosecution. (b)

Lord ELLENBOROUGH C. J. said, that if there had been any such necessity as supposed for the conduct of the defendant, it might have been given in evidence as matter of defence; but there was no such evidence, and as the indictment alleged that it was done *unlawfully and injuriously*, it precluded the presumption that there was any such necessity. He observed that the cases put by Lord *Hale* were put as instances, and that this subject had come under discussion in *Rex v. Sutton*, who was indicted in the year 1767 for erecting small pox houses.

LE BLANC J. in passing sentence observed that although the Court had not found upon its records any prosecution for this specific offence, yet there could be no doubt in point of law that if a person unlawfully, injuriously, and with full knowledge of the fact, exposes in a public highway a person infected with a contagious

(a) *Hale's P. C.* 432.

(b) The affidavit in support of the prosecution stated that the passage in which the defendant had exposed the child was a cul de sac, extremely narrow; that there was a small school kept there, and that two of the children had caught the disorder and died.

disorder, it is a common nuisance to all the subjects, and indictable as such. However, the Court was not disposed upon the present occasion to impute to the defendant an intention of being the cause of the consequences which had followed. Neither did they pronounce that every person who inoculated for this disease was guilty of an offence, provided it was done in a proper manner, and the patient was kept from the society of others so as not to endanger a communication of the disease. In such a case the law did not pronounce it to be an offence. But no person having a disorder of this description upon him, ought to be publicly exposed to the endangering the health and lives of the rest of the subjects.

The defendant was sentenced to imprisonment in the custody of the marshal for three calendar months.

CARRUTHERS *against* SYDEBOTHAM.

Friday,
April 28th.

ASSUMPSIT upon a policy of insurance, and the money counts. Plea, general issue. At the trial at *Lancaster* there was a verdict for the plaintiff for 33*l.* 1*5s.* 2*d.*, subject to the opinion of the Court upon the following case:

Where a ship, being under conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master, fastened at the

pier of the dock-basin, by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over on her side and bilged, in consequence of which when the tide rose she filled with water, and the goods were wetted and damaged: Held that this was a stranding to entitle the assured to recover for an average loss upon the goods.

The assured shall not be prevented from recovering against the underwriter an average loss upon a damage by stranding occasioned by the neglect of a *Liverpool* pilot appointed under stat. 37 G. 3. c. 78., while the ship is under his conduct.

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The policy was effected on the 29th of *November* 1813, in the usual form (a), on goods on board the ship *Alexander*, at and from any port in the United States of *America* not south of *Rhode Island* to *Liverpool*. On the 7th of *December* 1813, the ship, being in all respects fitted for the voyage, sailed from *Rhode Island* with a cargo consisting of staves, of barrels of pot-ashes, and casks of flax seed. On the 31st of *Jan.* 1814 she passed *Holyhead*, and took on board a pilot belonging to the port of *Liverpool*, duly appointed and licensed; and on the next day, about nine o'clock in the morning, she entered the river *Mersey*. When arrived in that part of the river which is opposite *George's Dock*, the captain being obliged to go on shore, to make his report at the custom-house, and to transact other necessary business of the ship, particularly desired the pilot to bring her to a safe anchorage in the *Mersey*, and not to let her take the ground, stating that she was a sharp-built vessel, and would not take the ground with safety. The pilot notwithstanding this information proceeded with the ship towards the entrance of *George's Dock* basin, and laid her a-ground in the *Mersey* on a bank, on the north side of the pier of the basin. When the captain returned in the afternoon, and found the ship in this situation, he strongly remonstrated with the pilot, and urged him to heave her into deep water as soon as the tide flowed, and to bring her to an anchor in the river. About the same time the dockmaster came to the pier head, and informed the pilot that the ship could not be got into dock on account of the ice,

(a) The usual form contains a memorandum by which *seed* (among other things) is warranted free from average, unless general, or the ship be stranded.

and

and that she could not lie where she was in safety. At flood tide the ship floated, when the pilot, in the absence of the master, who was on shore on necessary business, and in opposition to his advice, took her up to the pier of the basin of *George's Dock*, and fastened her there by a rope to the shore, with the intention that she should take the ground when the tide fell, and having thus fastened her, he left her about eight o'clock in the evening under the command of the mate, the captain being still detained on shore. Soon after the pilot quitted her, and before the captain returned, the mate was impressed and taken to the rendezvous house, where he was detained all night. About nine o'clock the vessel took the ground astern, soon after which the captain returned on board, and about midnight the water leaving the ship, she fell over on the side farthest from the pier with such violence that she bilged and broke many of her timbers, and lay upon her larboard beam ends. When the tide rose again she righted, but with 10 feet water in the hold, by which the pot-ashes and flax seed were completely wetted and damaged before they were or could have been discharged, and safely landed at *Liverpool*. Every exertion was made to pump the vessel to bring her up to the dock-gates, and to discharge her cargo with all possible dispatch. It was necessary to take the vessel into the graving dock to be repaired, when it was found that in addition to the other damage she had lost her false keel. The defendant had paid sufficient to cover all the loss, except upon the flax seed, which amounts to 33*l.* 15*s.* 2*d.*, for which this action is brought. The case then referred to stat. 37 G. 3. c. 78. for the regulation of pilots in the port of *Liverpool*,

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pool, and to 52 G. 3. c. 39. for the regulation of pilots on the coast of *England*.

The question for the opinion of the Court is, whether the plaintiff is entitled to recover the said sum of 33*l.* 15*s.* 2*d.* If the Court should be of opinion that the plaintiff is entitled, a verdict to be entered for him accordingly; if otherwise, a nonsuit to be entered.

Joy contended that the plaintiff was entitled upon two grounds; 1st, because here was a stranding of the ship within the meaning of the policy; 2dly, because such stranding, though occasioned by the negligence of the pilot, was nevertheless a peril for which the underwriter shall be answerable. 1st, He said, that to constitute a stranding, it need not be occasioned by the force of the winds and waves, neither need the place upon which the ship grounds be strictly a strand. And he cited *Johnson's Dictionary*, *Skinner's Etymologicon Linguae Anglicanae*, *Falconer's Marine Dictionary*, for the etymology of the noun, *Strand*; and *Neuman's Marine Dictionary*, for that of the verb, *to strand*, which imports not only in an active sense, "to drive upon the strand," but also in a neuter sense, "to lie immoveable and damaged upon the strand," in the same sense as the French naval term, "echouer," i. e. "toucher, donner—ou faire donner sur le sable." And thus in *Dobson v. Bolton*, sittings after *Easter term*, 1799, Lord *Kenyon* ruled that a ship which was damaged upon some wooden piles in the *Wisbeach* river, was stranded. So in *Burnet v. Kensington (a)*, the jury upon the first trial thought that it was not a stranding if the vessel got off the ground and prosecuted her voyage, but that

(a) 7 T.R. 210.

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stranding meant where she took the ground and bilged so as to be incapable of proceeding on her voyage; but that was held to be erroneous, and was afterwards set right upon another trial, where the stranding was established. And in *Nesbitt v. Lushington* (a), Lord *Kenyon* considered the memorandum as of a very extensive meaning, saying that it was inserted to prevent disputes, and the underwriter thereby agreed to ascribe the loss to the stranding, as the most probable occasion, though the fact cannot always be ascertained. 2dly, Though this stranding was occasioned by the misconduct of the pilot, yet shall the underwriter be answerable. This point was before the Court of Exchequer in the last term, in *The Attorney-General v. Case*, which was an information filed against the defendants to recover a compensation for damage done by their ship running foul of two king's ships, and the defence was, that their ship was not at the time under the command of their servants, but of a *Liverpool* pilot appointed under stat. 37 G. 3. c. 78. (*Liverpool* pilot act), and the Court, after argument, intimated a strong opinion that the defence was good. So in this case it will be found upon a consideration of that statute, as well as of stat. 52 G. 3. c. 39. (the general pilot act), that the owner is protected from responsibility for the acts of the pilot. For the 37 G. 3. c. 78. places in the hands of a committee the power over pilots for the port of *Liverpool*, as well to appoint and licence as to punish and dismiss them, and obliges all vessels under a penalty to take the first pilot, so appointed, who presents himself and his licence (b), and such pilots are said to have the

(a) 4 T. R. 783.

(b) St. 24. 37.

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charge of ships while in the river (a). Then comes the 52 G. 3. c. 39. of which sect. 30. enacts, that no owner or master of any ship shall be answerable for any loss, nor be prevented from recovering upon any contract of insurance by reason of any neglect, default, &c. of any pilot taken on board under any of the provisions of that act. Now a pilot taken on board under the local act is also under the provisions of the general act. For the general act extends to all local acts; and that is plain from its title, which is general, viz. "for the regulation of pilots, &c. on the coast of England," and from its preamble, which refers to the several local acts that have been passed, and that it is necessary that the names of *all pilots in England* should be known, and also from many other provisions contained in the act, which relate to *every* pilot (b). If this be so, the plaintiff's right may be determined upon the statute alone. But if it rested upon principle whether he should be liable for what the pilot has done, it might be asked, does the law hold any one liable for the acts of another who is not of his own choosing but imposed upon him by the law? The case of *Nicholson v. Mounsey* (c) affords the answer, that it does not, even where the party has a control left him, which in this case the plaintiff had not. And agreeably to this principle *Molloy* (d) gives the reasons why the master ought to be responsible for the acts of the mariners, viz. "for that the mariners are of his own choosing, and under his correction and government, and know no other superior on shipboard but himself; and if they are faulty he may correct and punish them, and justify the same by law;" for which

(a) S. 36.
 (d) 247.

(b) Ss. 44. 49. 51. 53. 59.

(c) 15 East, 384.

he cites *Roll. Ab.* 530. *Hern v. Smith*. But as to pilots *Beames* speaks thus (a), that “in many ports, entrance to harbours, &c., the taking a pilot is not a voluntary act, but obligatory on the master;” and he adds, that “in *England* after a pilot is taken on board the master has no longer any command of the ship, and the pilot is liable to an action for an injury done by his personal misconduct, although a superior officer is on board.”

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Littledale, contra, did not deny that the place where the damage happened was a strand, only he objected in respect of the cause of that damage here was not a stranding. And he argued that if a ship, or goods on board her, receive an injury while she is lying in a dry harbour, or upon a strand, not having been driven thither by the force of the elements, such injury was not imputable to a stranding within the meaning of this memorandum, although it is true that it happened upon a strand. For *stranding* imports that it is occasioned by some peril of the seas, and therefore, according to *Thompson v. Whitmore* (b), it is not a stranding if it be by the voluntary act of the party; as if the ship be laid on the beach, and there receive damage by sea water, this shall not charge the underwriter who only engages against the perils of the seas. So here, the defendant only engages against sea perils, and not against such perils as but for the place where the ship was laid by the act of the pilot would not have happened. And as to this being the act of the pilot and not of the master or mariners, the statute never meant to alter the relation of the pilot as servant to the master, but only to provide

(a) 203.

(b) 3 Taunt. 227.

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persons that should be capable of piloting. The pilot is to a certain extent, though not to the same extent that the mariners are, the servant of the master, and may declare against him upon his retainer, which differs this case from *Nicholson v. Mounsey*. And it seems to have been the opinion of Mansfield C. J. in *Huggett v. Montgomery*(a), and *Bowcher v. Noidstrom*(b), (although those cases were determined upon a different point, viz. the form of action,) that the captain, compelled as he is by the statute to take a pilot on board, is nevertheless answerable; for the pilot does not represent the ship. It would indeed be strange if the saving clause (sect. 30.) of the general pilot act, after the pains that have been used to limit it in words "to pilots taken on board in pursuance of any of the provisions of that act," should be construed, as the plaintiff would have it, to extend to such as are taken on board in pursuance of another act. And though many of the clauses of the general act do undoubtedly by their language extend to all pilots lawfully appointed, yet that is no reason why the above clause, and others like it, such as the 37th, 40th, and 52d, which are restrained in their enactments to that act, should be extended farther; on the contrary, the very differing of the language of these clauses denotes a difference of construction.

LORD ELLENBOROUGH C. J. Two questions arise upon this case. First, whether a stranding of the ship has taken place, in which event only the underwriter will be liable for damage to this species of commodity: and in this case the ship has lain on the strand, the

(a) 2 N.R. 446.

(b) 1 Taunt. 568.

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commodity has had sea water upon it, and has been damaged, which is one of the perils insured against; and all this has happened in the course of the voyage. For whether the ship was under the conduct of the pilot or the master, the damage is equally a damage in the course of the voyage, and so within the scope of the policy. The only remaining question then is, whether that which has happened is to be considered as having happened through the misconduct of the master and mariners, from which the underwriter is exempted. Now to make the pilot the representative of the master, and consequently to exempt the underwriter from liability for his acts, it must first be shewn that there is a privity between the pilot and the master, so that the one may be considered as the representative or agent of the other. But does the master appoint the pilot? Certainly not. The regulations of the general pilot act (a) impose a penalty upon the master of every ship which shall be piloted by any other person than a pilot duly licensed, within any limits for which pilots are lawfully appointed. And there is an exception of such places for which pilots are not appointed. But if the master cannot navigate without a pilot except under a penalty, is he not under the compulsion of law to take a pilot? And if so, is it just that he should be answerable for the misconduct of a person, whose appointment the provisions of the law have taken out of his hands, placing the ship in the hands and under the conduct of the pilot? The consequence is, that there is no privity between them. In general, if there be a damage arising from a marine peril, unless that damage

(a) Sect. 59.

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be induced by the act of the master, or mariners, or owner of the ship, it is a damage within the scope of the policy. Here has been a stranding which has occasioned an average loss, for which the underwriter will be responsible unless it has been occasioned by the party's own act. And how can that be, unless the act of the pilot who is imposed upon the master by law, is to be considered as his act? It appears to me, therefore, that the underwriter is liable; because this does not fall within the description of a damage that has been caused by the act of the assured themselves, but by the act of the pilot, between whom and the assured there was no privity. The same principle, I think, governed the case of *Nicholson v. Mounsey*.

LE BLANC J. I think the argument is against the underwriter upon both points. The underwriter has paid as upon a loss except in respect of a particular portion of the cargo. And the question is, whether there has been a stranding within the meaning of the policy; which will depend upon whether that which has happened, happened in the course of the voyage, and from one of the perils insured; the perils insured being all the ordinary perils to which ships in the course of navigation are liable. It appears that the master was compellable by law to take on board a pilot, and it was in consequence of his misconduct, that the ship, being upon an element to which the insurance extends, was placed in such a situation that when the water left her she fell upon her side; and thus the damage happened. Undoubtedly this amounts to a stranding; because the ship was upon a strand. Therefore the only question is, whether this is a peril which the underwriter insured

insured against: and I think that it is; because this was not a peril occasioned by the act of the master or mariners, from which the underwriter shall be exempted, but is to be considered as the act of the pilot. Independently of the general principle, the pilot act provides (a) “ that the owner of any ship, or consignee of goods, shall not be prevented from recovering any loss or damage upon any contract of insurance, by reason of any neglect of any pilot taken on board under any of the provisions of that act.” And what are the provisions of that act? They expressly relate to pilots appointed and taken on board under the regulations existing within particular districts. Such are the provisions, that a particular description of the person of every pilot, shall be written or indorsed on his licence (b); and that every pilot boat of every corporation or society established in relation to pilotage, or of any person authorized by them to act as pilot, shall be painted in a particular manner, and shall carry a particular vane or flag (c). And sect. 59. expressly applies to any limits for which pilots have been or shall be appointed by lawful authority, making the master compellable under pain of a particular forfeiture to take a duly licensed pilot on board. Therefore it may fairly be said that such pilots as are taken on board within this district, are taken on board under the provisions of the general act; because the general act relates in its provisions to pilots appointed for limited districts.

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BAYLEY J. I am entirely of the same opinion. The case has been so fully gone into by my Lord and my Brother *Le Blanc*, that it is unnecessary for me to enter

(a) Sect. 30.

(b) Sect. 44.

(c) Sect. 49.

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much into detail. With respect to this being a damage occasioned by a sea peril; it is clear that it was the sea water which occasioned it. Therefore upon that part of the case there can be no doubt. The case of *Thompson v. Whitmore*, and *Rowcroft v. Dunsmore*, which was there cited, are distinguishable, because in them the damage was primarily a land damage; the injury was from the ship's tumbling over. On the other ground too I am of opinion, that the ship being on the strand was therefore stranded within the meaning of the policy. And this being a case where the master of the ship was bound at his peril to take a pilot on board, he cannot be identified with the pilot, so as to make the damage that has happened through his neglect, a damage occasioned by the neglect of the master or owner.

Per Curiam,

Judgment for the Plaintiff.

Friday,
April 28th.

GOODRIGHT, on the Demise of LLOYD and Others, against JONES and Others.

Devise to his wife and daughter *E.* jointly during his wife's life, and from and after her decease to the

IN ejectment for a messuage and lands, with the appurtenants, called *Hendre*, in *Kilkennin* in the county of *Cardigan*, there was a verdict for the plaintiff at the use of *E.* for life, and from and after her decease to her first and every other son, according to seniority, and for want of such sons to her daughter or daughters to be equally divided, and if there should be no more than one daughter, to her use; and in default of such issue of his daughter *E.*, to his daughter *M.* for life, then to her first and every other son, subject to the like restrictions and limitations, and for want of such, to the daughter or as many daughters of *M.* to be equally divided; and for want of such, to his daughter *C.* for life, (remainder in like manner); and for want of all such issues, to his own right heirs for ever: Held that the remainder to *M.* and her children was not a contingent remainder defeasible by the event of *E.*'s dying and leaving a daughter, in whom the estate vested; but that such remainder took effect in the children of *M.* upon the death of the daughter of *E.*

Here-

Hereford assizes, subject to the opinion of the Court upon a case, which as to one point was thus:

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David Evans being seised in fee, &c. by his will dated the 19th *July* 1778, devised all that messuage, tenement, and lands, with the appurtenants, commonly called and known by the name of *Hendre*, with all and singular houses, &c. thereunto belonging, to his wife *Jane*, and to his daughter *Elizabeth*, spinster, to hold to them jointly during the life of his wife, and from and after her decease to the use of his said daughter for life, and from and after her decease to the first and every other son of her body lawfully to be begotten, according to seniority of age and priority of birth, the elder always to be preferred before the younger; and for want of such sons, to the daughter or daughters of the said *Elizabeth*, to be equally divided between them share and share alike; and in case there should happen to be no more than one daughter, to the use of such daughter; and in default of such issue of his daughter *Elizabeth*, then to his daughter *Mary*, wife of *John David*, during her life; then to the first and every other son of her lawfully begotten, subject to the like restrictions and limitations; and for want of such, to the daughter or as many daughters of his said daughter *Mary*, to be equally divided between them share and share alike as aforesaid; and for want of such, to his daughter *Catherine*, wife of *Thomas John*, for life; and from and after her decease, to the first and every other son of her body lawfully begotten, subject to the like limitations; and for want of such, to the daughter or daughters of her body as aforesaid, to be equally divided between them share and share alike; and for want of all such issues, to his own right heirs for ever." The testator at the date of his

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his will, and also at his death, had five daughters, *Elinor, Jane, Catherine, Mary, and Elizabeth*, who were all (except *Elizabeth*) married and had issue in his lifetime. The testator died, and *Jane* his widow and his daughter *Elizabeth* entered upon the premises and were possessed. *Elizabeth* died, and *Mary* her only child took possession of an undivided moiety, and held it until the death of *Jane* the widow, and upon her death became possessed of the whole, and afterwards died at the age of 27 intestate and without issue. At her death the defendants, who were the daughters and only children of *Mary David*, then deceased, the testator's daughter, and next devisee named in the will, entered and were possessed of the whole. And the question between them and the lessors of the plaintiff, who claimed three-fourths as heirs of the testator's other three daughters, was, whether the limitation in favour of *Mary David* and her children ever took effect.

Abbott for the plaintiff contended that the remainder to the children of *Elizabeth* was for life only, there being no words of inheritance to give them a greater estate; for the words *in default of such issue*, upon which the remainder over is limited, mean the same as "in default of such children." Then the devise to *Mary* and her children is a contingent devise only, on the event of there not being any child of *Elizabeth* to take; and if there should be a child of *Elizabeth*, then the remainder over to be void. It is a contingency with a double aspect; *Elizabeth* was unmarried at the death of the devisor; the devise is, if *Elizabeth* should die having a son or daughter, the remainder is to vest in them; but if she has no

son

son or daughter, then it is to vest in *Mary*, or her children, otherwise to be defeated. Wherefore, since *Elizabeth* died and left a daughter in whom a life estate vested, the limitation over to *Mary* and her children has failed. And for this he cited *Denne v. Page* (a), *Keene v. Dickson* (b), *Hay v. Lord Coventry* (c), *Foster v. Lord Romney* (d), *Doe v. Perryn* (e), *Rex v. Marquis of Stafford* (f), but admitted that in the two last the estates, upon the vesting of which the subsequent remainders were held to be defeated, were estates in fee. And as to what was held in *Doe v. Dacre* (g), that the words “for default of such sons,” did not make the remainders over contingent, that was upon a view of the whole will, because it appeared that the testator never meant his heir to take until there should be a complete failure of the issue of all his seven sisters.

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W. E. Taunton contrà, admitted that the estates limited to *Elizabeth* and her sons and daughters, and to the testator's other two daughters, their sons and daughters in succession, were only life estates; which might well be, since life estates may be limited to unborn children. But here he said, as in *Doe v. Dacre*, it was plain from the ultimate limitation to his right heirs “for want of all such issues,” that the testator did not intend his right heirs to take until all the issues of his daughters failed, whereas, as the plaintiff would have it, if the first taker should have a son in whom the remainder should vest but for an instant, all the subsequent limitations would be gone. And he was proceeding to

(a) 11 *East*, 603. n.(b) 1 *B. & P.* 254. n.(c) 3 *T. R.* 83.(d) 11 *East*, 594.(e) 3 *T. R.* 484.(f) 7 *East*, 521.(g) 1 *B. & P.* 250.

observe

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observe on the cases cited, but was stopped by the Court.

LORD ELLENBOROUGH C. J. It appears to me without reference to other cases that the testator intended to give successive estates for life to his daughters, inverting the order; first he gives it to his younger daughter *Elizabeth*, and after her decease to the first and every other son of her body, (under which devise they would take estates for life,) and for want of such sons to the daughters, to be equally divided between them, and in case there should not be more than one daughter, then to her, and in default of such issue to his daughter *Mary* with the like limitations, and then to his daughter *Catherine* in like manner. The question is whether if there should be no son or daughter of *Elizabeth*, or if being any such they should fail, the testator intended that the estate should go over to the next in remainder. And it appears to me that he did so intend. For this is plain from the ultimate remainder “for want of all such issues,” to his right heirs, that the testator intended that nothing should go over to his right heirs until all the issue of his three daughters had completely failed.

LE BLANC J. Taking the whole will together I think the words *in default of such issue*, mean if there should be a failure of issue.

BAYLEY J. *Denne v. Page*, and *Hay v. Lord Coventry*, do not go so far as has been supposed; the question in them was not whether the subsequent limitations should be defeated, but whether the devisees took

life estates, or estates in tail. And the court in *Doe v. Dacre* do not seem to have followed the authority of *Keene v. Dickson*, neither did Lord *Kenyon* much approve of *Denne v. Page*, when *Doe v. Dacre* was before this court in error (a). Of *Keene v. Dickson* however it may be observed that the construction was such as to effectuate the intention of the testator, for the daughters would have been disappointed if it had been construed that the remainder over vested. But here such a construction will disappoint no one.

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DAMPIER J. The construction contended for on the part of the plaintiff would disappoint some material words in this will. By the words of the will the estate was not to go over to the devisor's right heirs except "for want of all such issues," that is, all the sons and daughters of his three daughters. The construction of the plaintiff would reduce it to this, that if any one of the sons or daughters of *Elizabeth* should take, the other remainders were to be at an end, notwithstanding there were sons and daughters of *Mary* and *Catherine*. But I construe the words "in default of such issue," and in order to effectuate the intention it is absolutely necessary so to construe them, in this way, viz. if there be no issue, or if being issue it should fail. The consequence is, that there must be judgment for the defendants.

Judgment for the Defendants.

(a) 8 T.R. 112.

1815.

Monday,
May 1st.

Where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, and writ of error upon the judgment, assigning that for cause, the Court allowed the plaintiffs to amend the judgment and transcript in a term subsequent to that in which the judgment was signed, by entering a remittitur for the excess.

USHER and Another *against* DANSEY and Others.

THE plaintiffs declared in assumpsit, as indorsees of a bill of exchange, for 1574*l.* 18*s.*, and laid the damages at 1630*l.* And at the trial after last *Michaelmas* term the jury gave a verdict for 1685*l.*, being the amount of principal and interest to the 4th day of the following term; for which sum, together with costs, judgment was entered in that term. — Error in parliament on this judgment, and transcript carried in on the 15th of *March*; and the error assigned was for the excess of the verdict above the damages laid in the declaration, and that judgment was entered thereon. Joinder in error. And upon a former day in this term the plaintiffs obtained a rule nisi for liberty to amend the judgment roll by entering a remittitur of 55*l.*, and to have judgment for the residue, and also to amend the transcript on payment of costs in error, &c.

Gifford now shewed cause, and admitting that the Court had a twofold authority to make amendments, first, at the common law, 2dly, by the statutes, denied their authority to amend in this case. For at the common law the Judges might only amend their judgment in the same term (*a*), but not afterwards, and therefore according to *Ray v. Lister* (*b*), *Cheveley v. Morris* (*c*), a remittitur cannot be entered in a term subsequent to that in which the judgment is entered. And even in the same term the Judges might not amend

(*a*) 8 *Rep.* 157. *Gilb. C. P.* 108.
(*c*) 2 *Bl. R.* 1300.

(*b*) 2 *Str.* 1110. *Andr.* 351.

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a mistake of the jury, and of the party himself in taking judgment for the whole, instead of entering a remittitur for the excess and taking judgment for the residue, which the plaintiff in this case ought to have done (a). Wherefore the Court in *Sabin v. Long* (b) refused the amendment, because the plaintiff's taking damages for the whole made the judgment bad in law, and it was a mistake founded upon the verdict. And as to *Pickwood v. Wright* (c), where the Court allowed the amendment, non constat but that it was in the same term, and unless it had been allowed, it appears by the note that the plaintiff would have been out of time. Besides, that case is at variance with *Sandiford v. Bean*, there cited, and the other authorities were not pointed out to the attention of the Court. That case also was before joinder in error, but here it is after; and it seems that after in nullo est erratum, it is never admitted to amend errors; *Barnsly v. Shrimpton* (d). 2dly, As to the statutes, it has always been considered that the only things amendable by stats. 8 H. 6. c. 12. and c. 15. (of amendments) are misprisions of the clerks, and that they do not extend to any default of the party or his counsel (e); and so strict was this rule held, that it was adjudged in an action upon the case, if the plaintiff recovers costs, and the record is entered that he shall recover per incrementum assessed per *Jur.* where it ought to be per *Cur.*, for the Court increases it and not the jury, though this be but a mistake in a letter, yet because it is in a judgment, it cannot be amended by the statute (f).

(a) *Sandiford v. Bean*, 2 Bac. Abr. Damages, (D. 2). *Coy v. Hymes*, 2 Str. 1171.

(b) 1 Wils. 30.

(c) 1 H. Bl. 643.

(d) 8 Mod. 304.

(e) 8 Rep. 162.

(f) Vin. Abr. Amendment, F. pl. 2.

Park,

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Park, Marryat, and Abbott, contra, cited *Short v. Coffin* (a), *Petrie v. Hannay* (b), *Doe v. Perkins* (c), *Newnham v. Law* (d), *Hardy v. Cathcart* (e), *Dunbar v. Hitchcock* (f), in answer to the objections that the Court could not make this amendment after the term of the judgment, and after joinder in error. And they relied on *Pickwood v. Wright* for the making it, in opposition to *Sandiford v. Bean*. And as to this being the party's own error to enter the judgment for the whole damages, the entering of judgment is the act of the Court and not of the party; neither could the party of himself have remitted the damages, and signed judgment for the lesser sum, without leave of the Court; *Dickinson v. Plaisted* (g). Wherefore the error is the misprision of the clerk, and is amendable as such under the statutes, at the discretion of the Court.

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was a question arising after writ of error brought upon a judgment; the judgment was entered for 1,685*l.* the damages found by the Jury, the damages laid in the declaration being only 1,630*l.*, and the application was for leave to amend the judgment roll by entering a remittitur for the difference. And the question in this case is whether this amendment can be made after judgment given in a former term, and writ of error brought thereon, and joinder in error. It was objected that it could not be made after the term in which

(a) 5 Burr. 2730.

(b) 3 T. R. 659.

(c) *Ibid.* 749.

(d) 5 T. R. 577.

(e) 1 Marsh. R. 180.

(f) *Ante*, vol. iii. 591.

(g) 7 T. R. 474.

judgment

judgment was given, and it was not contended that it could except by the authority of the court. Several cases were cited, and the court think that there are two express authorities for allowing this amendment; one in *Marsh. Rep. C. P.* 180. *Hardy v. Cathcart*, and a former case in 1 *H. Bl.* 643: *Pickwood v. Wright*. *Hardy v. Cathcart* was a penal action, and the jury found a verdict for the plaintiff with 1s. damages, which could not lawfully be, because damages cannot be given for the detention of the debt in a penal action. And judgment having been entered for the damages, error was brought thereon for that cause, and upon application to the Court of Common Pleas for leave to amend the judgment by entering a remittitur of the damages, the Court, after a review of the precedents and after taking time to consider, thought itself at liberty to make the amendment. There the question was argued whether the amendment could be made by stat. 8 *H.* 6., which authorizes the Judges to amend all which in their discretion seems to be misprision of the clerks. It was argued that the Court had authority to allow the amendment, in that which was clearly a misprision of the Clerk within the statute; and *Heath J.* who delivered the judgment, said that "It was a rule at common law that a judgment could not be amended after the term in which it had been entered up, but that several statutes had corrected and supplied this defect in the law, and particularly the statute of *H.* 6. relieved in all cases where the error had arisen from the misprision of the clerk." Thus it seems as if the amendment made in that case was founded upon the statute, considering the error as the misprision of the clerk. In *Pickwood v. Wright* the same leave was given to enter a remittitur of

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the damages found beyond the sum laid in the declaration, as is sought by the present rule, and that also was done pending a writ of error, though whether after joinder in error does not appear; but that circumstance is immaterial as to the power of the court, and can only operate if at all upon its discretion. The only limitation, indeed, that seems to have been pressed in argument was, that this cannot be done after the term in which judgment is entered; yet this appears to have been done in *Pickwood v. Wright*, for the amendment was, according to the report, on the 4th of *July*, and upon inquiry it turns out that the judgment was of *Easter*, which was the preceding term. In that case *Sandiford v. Bean* was cited from 2 *Bac. Abr.* (*Gwill.* edit.) 267. (Damages. D. 2.) “that if the jury give more, the plaintiff must relinquish the extra damages; for if he enter up judgment for the whole which the jury give, it is error, and cannot be amended or helped in any manner.” That the party may not do it after the term without the interposition of the Court is correct, but not that it may not be done at all, especially if it is to be considered as the misprision of the clerk. And certainly this has been considered in former cases as the misprision of the clerk. In *Owen*, 45. the plaintiff laid his damages at 20*l.*, the jury gave 30*l.*, and by the Court, the plaintiff shall recover no more than he has declared for, and this ought to be done of course by the clerks. And for this position 2 *H. 6.* 7. 8 *H. 6.* 4. 42 *Ed.* 3. 7. are cited. The case of *Ray v. Lister*, 2 *Str.* 1110., but better reported *Andr.* 384., was relied on in argument against the rule. There *Page J.* considered that the sum found beyond the damages laid was surplusage, and ought to be rejected as vitium clerici, and not warranted by the record; but the other
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Judges held the contrary. And *Lee C. J.* said, that this could not be considered as *vitium clerici*, because (according to 10 *Co.* 117. *b.*) in some cases the plaintiff might have judgment for more damages than he has counted for. I confess the reason somewhat staggered me, and upon looking to the authority cited for it, I found that although Lord *Coke* in his position, and *Lee C. J.* are literally borne out by the authority, yet they are not by any means substantially so for the purpose for which the authority is cited. For the case cited (8 *H.* 6. 5. *a.*) by no means establishes that the plaintiff may have more damages against the defendant than what he has counted for *against him*, but that having counted in detinue against the defendant for damages to a certain amount, he may recover *against the garnishee* (against whom he has alleged no particular amount of damages) a greater sum than he has laid as his damages against the defendant. As to the other point, *Martin*, then a Judge of the Common Pleas, says, "Whether he shall recover damages according as he had declared, or according to what is found by the inquest, it seems to me that this declaration will not estop him, for as to the garnishee he does not declare at all, wherefore as to this he is at large:" and *Paston*, another Judge, afterwards (p. 11.) says, "The damages to be recovered against the defendant cannot be the damages to be recovered against the garnishee; and this declaration shall not estop the plaintiff to recover damages beyond what he had declared against the defendant, for as I have said they are other damages." Therefore the reason given by *Lee C. J.* in answer to *Page J.*, that the entry of the excess of damages found by the verdict could not be considered as *vitium clerici*

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and surplusage, because the plaintiff might recover more than the damages laid, is not true when applied to the defendant against whom the damages are laid. And so Lord Rolle (1 Roll. Abr. 578.) properly explains it; “but, says he, the plaintiff in detinue shall recover more damages against the garnishee than he had counted for, for his count was not against the garnishee, but against the defendant, and damages against him are for the delay after the count.” Thus it appears Lord Coke had taken that up as a general position, which was only founded upon the case as against the garnishee, and *Lee* C. J. probably adopted it without looking to the authority upon which it rested. And thus far I have thought it right to advert to the case, in regard to what has been thrown out, that the plaintiff may recover more damages than he counts for. Without determining whether this may be treated as vitium clerici, which however seems to have been the opinion in *Hardy v. Cathcart*, or whether it falls within the scope of the Court’s general authority to amend, as in *Pickwood v. Wright*, it appears from that case that the Court has authority to amend such errors as this after the term of the judgment. I have before observed that it turns out upon inquiry, though the report does not state it, that the amendment in *Pickwood v. Wright* was of a term subsequent to the judgment; therefore upon that precise authority, we think that the Court may make this amendment. Although the party cannot himself now make it, yet if the Court can, they may authorize him to become their instrument by entering a remittitur for the excess. If they may do it by their own authority, they may do it by deputing him. Wherefore we are of opinion that this rule ought to be made absolute.

Rule absolute.

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ROSE and Others *against* MILES.Tuesday,
May 2d.**E**RROR to reverse a judgment of the Common Pleas.

The plaintiff declares in one of the counts, that whereas the plaintiff before and at the time of committing the grievances by the defendants, was lawfully possessed of certain barges and other craft laden with goods, wares, and merchandizes of the plaintiff, and just before and at the time of committing the grievances was navigating his said barges and craft so laden along a certain navigable creek, part of a certain public river, situate, &c., yet the defendants well knowing the premises, but contriving and wrongfully and unjustly intending to injure the plaintiff, and to prevent him from navigating his barges and craft, so laden as aforesaid, along the said public navigable creek, heretofore, to wit, on, &c. wrongfully and injuriously moored and fastened, and caused to be moored and fastened, a certain barge across the said public navigable creek and the channel thereof, and kept and continued the said barge so moored and fastened across the said navigable creek, and the channel thereof, for a long space of time, to wit, from thence hitherto, and thereby during all the time aforesaid obstructed the said public navigable creek and the channel thereof, and thereby prevented the plaintiff from navigating his said barges and craft so laden along the said public navigable creek; by reason of all which premises the plaintiff was not only during all the time aforesaid obliged to convey all his said goods, wares, and merchandizes, a great distance over land, but was also during the time aforesaid put to

Where plaintiff declared that before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expence in the carriage of his goods over land: Held that this was such a special damage for which an action upon the case would lie.

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great trouble and inconvenience in carrying on his business, and hath been obliged to expend divers large sums of money, to wit, 500*l.*, in and about the carriage of his said goods, wares, and merchandizes, over land as aforesaid.

Plea, not guilty; and a general verdict for the plaintiff upon the whole declaration, with 20*s.* damages. And the errors assigned were, that the supposed obstructions in the public navigable river in the declaration mentioned, are in the nature of a common nuisance to all the subjects of the realm, and not of a particular or private injury to the plaintiff; and it is not shewn that the plaintiff has actually incurred or sustained any special damage by reason of such obstructions. Also, that the plaintiff has brought a personal civil action, and recovered damages therein for a grievance or nuisance remediable only by criminal prosecution. Also, that the declaration is not sufficient in law, &c. Joinder in error.

Marryat, in support of the errors, contended that the rule of law was clear, that for a common nuisance in a public highway the remedy is by indictment and not by action, unless there be some special damage alleged; the reason of which rule is for the avoiding of multiplicity of suits; for if this plaintiff may have an action, by the same rule every person navigating the creek may have the like action. Wherefore the plaintiff, in order to maintain this action, ought to shew a particular damage. Thus it was considered in *Chichester v. Lethbridge* (a); and thus according to *Hubert*

(a) *Willes*, 71. See also *Co. Lit.* 56. a.

v. *Groves* (a) the mere obstruction of the plaintiff's trade, or as it was resolved in *Paine v. Partrich* (b), the delaying him in his journey a little while, by reason whereof he is damnified, or some important affair is neglected, is not such a special damage for which an action on the case will lie, but the particular damage ought to be direct and not consequential, as for instance, the loss of his horse, or some corporal hurt. Now in this case the plaintiff has not declared for any particular damage, but generally that his craft was obstructed, by reason of which he was compelled to take his goods another way, and put to inconvenience and expence, all which is consequential, and must be common to every one who before used the way, and there is no direct damage to his property or person.

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LORD ELLENBOROUGH C. J. In *Hubert v. Groves* the damage might be said to be common to all, but this is something different, for the plaintiff was in the occupation, if I may so say, of the navigation; he had commenced his course upon it, and was in the act of using it when he is obstructed. It did not rest merely in contemplation. Surely this goes one step farther; this is something substantially more injurious to this person, than to the public at large, who might only have it in contemplation to use it. And he has been impeded in his progress by the defendants wrongfully mooring their barge across, and has been compelled to unload and to carry his goods over land, by which he has incurred expence, and that expence caused by the act of the defendants. If a man's time or his money are of any

(a) 1 *Esp. N. P. C.* 148.(b) *Cartb.* 191.

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value, it seems to me that this plaintiff has shewn a particular damage.

BAYLEY J. The defendants in effect have locked up the plaintiff's craft whilst navigating the creek, and placed him in a situation that he unavoidably must incur expence in order to convey his goods another way.

DAMPIER J. The present case I think admits of this distinction from most of the other cases, that here the plaintiff was interrupted in the actual enjoyment of the highway. The expence was incurred by the immediate act of the defendants, for the plaintiff was forced to unload his goods, and carry them over land. If this be not a particular damage, I scarcely know what is.

Per Curiam,

Judgment affirmed.

Heath was to have argued for the defendant in error.

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Ld. Viscount DUNCAN, Executor of Ld. Viscount DUNCAN, deceased, *against* MITCHELL, Administrator of Sir A. MITCHELL, deceased.

Wednesday,
May 3d.

THIS case was argued in *Trinity* term 1814, by *Brougham* for the plaintiff, and *E. Larves* for the defendant, upon the two points determined by the Court. The following cases were cited upon the second point; *Lord Nelson v. Tucker* (a), *Johnstone v. Margetson* (b), *Case of the Island of Trinidad* (c), *Case of the Lord Middleton* (d), *Pigot v. White*. (e)

The King's warrant of the 26th of *June* 1800, for the distribution of prize taken in the expedition to the *Texel*, did not intend to authorize the two commanders in chief, and the flag and general officers, or such of them as could conveniently be assembled, to determine or to refer to the determination of others, the right of a flag officer claiming his share of the distribution, as being the naval commander in chief at the time of the capture.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the court. This was an action for money had and received, brought to try the validity of the late Lord *Duncan's* claim to share in the prizes taken in the *Texel* in *August* 1799, as naval commander in chief at the time of that capture. There were two questions discussed upon the argument: one, whether the question of right was not concluded and bound by an award made by certain referees on the 3d of *December*

Where an admiral, appointed to the command of an expedition from this country was instructed to put himself and his fleet under the command of the admiral commanding the station, if his co-operation should be necessary, and did accordingly put himself and his fleet under such command, and was directed by the admiral of the station, whilst he remained with him to consider himself under his command, and to attend to all orders and signals whilst the fleets were on the same station, and the admiral of the station did several acts forwarding the objects of the expedition, and issued orders relating thereto, but in consequence of ill health left the station with the ships under his command, and sailed for *England*, and at the time when the enemy's fleet agreed to surrender was out of sight, and not in a situation to have afforded the least assistance, and the enemy's fleet surrendered the day after he sailed: Held that the admiral of the station was not entitled to his share of distribution of prize as commander in chief of the expedition at the time of the capture, but that the admiral appointed to the command of it was.

(a) 4 *East*, 238.(b) 1 *H. Bl.* 261.(c) 5 *Rob. Adm. R.* 92.(d) 4 *Rob. Adm. R.* 153.(e) 1 *H. Bl.* 265. n.

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1806; the other, whether independently of that award, and considering the question as not so concluded and bound, Lord *Duncan* stood in the situation of naval commander in chief of the ships concerned in the capture at the time when the capture was made, and whether Sir *Andrew Mitchell* was not a mere flag officer under him, or whether Lord *Duncan* was not wholly unconnected with the capturing ships at the time of the capture, and Admiral *Mitchell* the naval commander in chief at that period. The first question, which is on the effect of the award, depends upon His Majesty's warrant of the 26th of *June* 1800. . By that warrant the king grants the produce of the ships, &c. to Sir *Ralph Abercrombie*, and Sir *Andrew Mitchell*, by name, but without describing them as commanders in chief of the land and naval forces, in trust to be by them paid and distributed to and amongst such persons employed in the army and navy on the said expedition, as might be entitled thereto, according to a plan of distribution stated in the warrant. By that plan the whole was to be divided into eight equal parts, and of those one eighth was to go "to the two commanders in chief of the
 " army and navy, (it being a conjunct expedition,) and
 " to the flag and general officers, so that each commander
 " in chief should take double that share which each
 " general or flag officer not being commander in chief
 " should take, but if the number of flag and general officers, exclusive of the two commanders in chief, should
 " exceed four, in that case a moiety of the said eighth
 " was to be divided equally between the two commanders
 " in chief, and the other moiety among the flag and
 " general officers." The warrant then specified amongst what persons the other 7-8ths should be distributed, as
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colonels and majors in the army, and post captains and masters and commanders in the navy, in the 2d class: captains of marines and land forces, and sea lieutenants and others, in the 3d class: and so in different classes, pursuing and comprehending the different descriptions of officers, seamen and soldiers, in the two services; and concluded with this provision: “ And we are graciously pleased farther to order and direct that in case any doubts shall arise respecting the said distribution, and the classing of the different individuals concerned, the same shall be determined by the two commanders in chief, and the flag and general officers, or such of them as can conveniently be assembled, or by such person or persons to whom they, or the majority of them, shall agree to refer the same.” Under this clause four of the general officers concerned in the expedition, being all who could conveniently attend, and there having been no flag officer but Sir *A. Mitchell*, referred the question of Lord *Duncan*’s right to three referees, and they decided in Lord *Duncan*’s favour, and if the king’s warrant authorized such reference, their award is conclusive. Upon our desiring, at the close of the argument, to be supplied with a copy of any memorial presented, or representation made to the crown, prior to the granting of the warrant in question, and which might be supposed to have operated as an inducement to the grant, and to be therefore regarded as explanatory in some degree of its intention and object, we were furnished with a copy of a memorial presented by Sir *A. Mitchell*, dated the 17th of *April* 1800, two months and nine days before the warrant of distribution of the 26th *June* 1800 issued, and this letter, coupled with the subsequent warrant shews very strongly that

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that the crown in its warrant contemplated Sir *A. Mitchell*, and nobody else, as the naval commander in chief, and did not mean to reserve any doubt on that subject for the arbitration of the two commanders in chief, and the general and flag officers, under the provision before mentioned. It is material to look to that memorial, for in it it is plain Sir *A. Mitchell* considers himself as having the command all along, and never considers Lord *Duncan* in any other light than as having afforded him assistance. He states in his memorial the unceasing and powerful support afforded him by Lord *Duncan* with the fleet under his command, that condemnation had been made of four frigates and two hulks captured, and that His Majesty had been pleased to direct that those ships, late in the service of the *Batavian Republic*, which surrendered to the squadron under his command, should be divided between the navy and army employed in that expedition. And then he complains of measures that had been taken to procure a different mode of distributing the same. Thus far he uniformly treats it as a service performed under his command, and he then concludes by petition that His Majesty would direct distribution in equal moieties to the navy and army, praying this on behalf of himself, the officers, seamen, and mariners lately serving under him, and never adverting to Lord *Duncan*. The objection made to the reference is, that it could not have been in the contemplation of the crown, when this warrant (explained particularly as it is by reference to the memorial) was framed, matter of doubt, who were the two commanders in chief; that it was not worded with a view to such a question; and that it never could have been the intention to submit such a question to the tribunal this war-

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rant creates. The words which the warrant uses to designate the cases in which this tribunal is to act, are “in case any doubts shall arise respecting the said distribution and the classing of the different individuals concerned. “Classing the individuals concerned” is not properly applicable to the situation of an individual not being one of any class of persons, and the determining in which of the several classes they are to rank assumes it to be matter of certainty who the individuals to be affected by such determination are, and if the object were to give a power to decide what persons were concerned, it would be a very imperfect mode of accomplishing that object, merely to give a power to class the different individuals concerned. And the other words as to “doubts respecting the said distribution” are not much better calculated to confer the power of deciding who were the individuals concerned. It is not necessary for us to say whether those words are, or are not properly large enough to let in such a question, if we could collect from any other parts of the warrant that it was intended to comprehend it; but the inaptitude of the words in themselves to comprehend such a question afford one ground for presuming that there was no such intention. Another ground of presumption arises from the tribunal which this warrant creates. It certainly must have been intended that they should be capable of deciding in the first instance, by themselves, whatever question they might afterwards upon consideration choose to refer. The powers of deciding and referring are apparently co-extensive. Now it is obvious that any decision by the officers themselves, or by their referees, might in many cases be frustrated, and rendered ineffectual, by the improper

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improper admission or exclusion of Lord *Duncan*, either in his voting upon the decision of the question itself, or upon the choice of referees to decide it. Suppose, for instance, five of the other officers to meet, either to decide the question themselves, or to nominate referees, and Lord *Duncan* to lay in his claim to attend and vote: and suppose of the five, three to be against Lord *Duncan's* claim, and two for it: no decision by them could conclude the question, nor could any nomination of referees in which the three and the two voted different ways be free from further question. If Lord *Duncan* were suffered to interfere and to vote with the two, it would be open to the objection afterwards, that a person who had no right had been joined with the persons who alone had the power, and if he were excluded and not suffered to interfere, the question that he was unjustly and wrongfully excluded would still be open. The uncertainty therefore which would constantly occur, as to who would be the persons properly entitled to sit and vote upon the decision of this question, or upon the nomination of the referees to decide it, furnishes a strong ground for presuming that such a question was not in the contemplation of the crown when this warrant was framed, and coupled with the memorial, a conclusive one, that there was no intention of submitting this question to such a tribunal, or to referees appointed by them. For these reasons we are of opinion that the reference in this case was not authorized by the king's warrant. And this brings us to the second question, which (the award being removed out of the way) is open for our decision; and that is, whether Lord *Duncan*, or Sir *A. Mitchell*, was in fact the naval commander in chief on this occasion. As to which the facts

stated are shortly these: In 1799 an expedition was sent from this country against *Holland*, and Sir *A. Mitchell* was appointed to command the naval force, but it was part of his instructions, that “if it should be judged expedient to attack the *Helder* and *Texel*, or any more northern part of *Holland*, in the execution of which service the co-operation of Lord *Duncan*, with the fleet under his command (a), might become necessary, he was, upon joining his Lordship, to put himself and the ships and vessels with him under his Lordship’s orders, and to follow such directions as he might judge it necessary to give for the regulation of Sir *A. Mitchell*’s conduct while employed on that service.” On the 18th of August 1799, Sir *A. Mitchell* joined Lord *Duncan*, and put himself under Lord *D.*’s command (b), and Lord *D.* on the same day issued orders to Sir *A. Mitchell*, “directing him whilst he remained with Lord *D.*’s fleet, to consider himself under his, Lord *D.*’s, command, and to attend to all orders and signals Lord *D.* might make to him, whilst the fleets were on the same station.” On the 22d Lord *D.* prepared a summons to the *Dutch* admiral to surrender, and between that time, and the 29th, he did divers acts forwarding the objects of the expedition (c), drew out a line of battle, and issued several orders to Sir *A. Mitchell* relating to this service. On the 29th there was another summons to the *Dutch* admiral, and a flag of

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(a) The case stated that Lord *Duncan* was then commander in chief in the *North Seas*, having been appointed to that command in 1795.

(b) On that day also Sir *A. Mitchell*, and Sir *R. Abercrombie*, the commander of the troops, went on board Lord *Duncan*’s ship, where the plans were concerted for landing the troops and obtaining possession of the enemy’s fleet in the *Texel*.

(c) The landing of the troops was effected on the 27th under Lord *Duncan*’s orders.

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truce from him with proposals for surrendering, but *in the evening of that day*, i. e. the 29th of *August*, Lord *Duncan* (in consequence of ill health) with the ships under his command *left the Texel, and made all sail for England*. He was afterwards becalmed and obliged to anchor, but he set sail again the next morning, and *at the time the Dutch fleet agreed to surrender*, it is stated that *all his ships were out of sight of Admiral Mitchell's, that they were not in a situation to have seen signals of distress, to have heard his guns, or to have afforded his fleet the least assistance*. On the 2d of *September* Lord *D.* wrote to Sir *A. Mitchell* to consider himself as not being under his command longer than from the 30th of *August*, and said he should have given him that intimation on his leaving the *Texel*, had he not become indisposed. The *Dutch* fleet agreed to surrender about two o'clock on the 30th, and their colours were struck about ten at night. And under these circumstances the question is, whether Lord *Duncan* was commander in chief of the naval part of this expedition at the time these ships were taken, or Sir *A. Mitchell*; and we are of opinion upon full consideration that Sir *A. Mitchell* was, and that Lord *Duncan* was not. Sir *A. Mitchell* had originally a distinct and independent command from the Admiralty; it was only with a view to a service in which the cooperation of Lord *Duncan's* fleet might become necessary that he was to join Lord *D.* and put himself and his ships under Lord *D.'s* command; Lord *D.* only directed him to consider himself under his, Lord *D.'s* command, whilst he remained with Lord *D.'s* fleet, and Lord *D.* afterwards desired him to consider himself as not being under Lord *D.'s* command longer than from the 30th of *August*, and signified that but

for indisposition he would have given him that intimation before he left the *Texel*. Lord *D.*'s original orders therefore signified that it was only whilst Sir *A. Mitchell* remained with Lord *D.*'s fleet that he Sir *A. Mitchell* was to be subordinate to Lord *D.*, and that he Lord *D.* was to be deemed commander in chief, and Lord *D.*'s letter of the 2d of *September* is properly to be understood as founded upon that notion. Can it then be said that Sir *A. Mitchell* remained with Lord *Duncan's* fleet to the time of the capture, upon which circumstance the continuance of Lord *Duncan's* command was made by himself to depend, when it is stated that at the time of the capture Lord *D.*'s fleet was sailing for *England*, out of sight, out of hearing, and beyond the power of giving assistance? If this be not the case, the consequence is, that Sir *A. Mitchell* was himself the naval commander in chief, and that the plaintiff is not entitled to recover; and the verdict must therefore be entered for the defendant.

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WEBB against JIGGS and MARTHA his Wife. (a)

Wednesday,
May 3d.

DEBT. The plaintiff declares that one *J. Webb* was seised in fee of certain lands at *Iver*, in *Buckinghamshire*, and being so seised, by his will, duly executed according to the statute, gave and bequeathed to the plaintiff an annuity or yearly rent of 10*l.* to be issuing and payable yearly and every year during the life of the de-

Debt does not lie at the common law, nor by stat. 8 Ann. c. 14. for the arrears of an annuity or yearly rent devised payable out of lands to *A* during the life of *B.*, to

whom the lands are devised for life, *B.* paying the same thereout, so long as the estate of freehold continues.

(a) This case was argued at Serjeants' Inn before *Hilary* term, in the absence of *Dampier J.*

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defendant *Martha* out of the said lands, and also gave and bequeathed the said lands to the said *Martha* and her assigns for her life, she paying thereout in manner aforesaid to the plaintiff the said annuity or yearly rent, and afterwards the said *J. Webb* died, and his will was duly proved, whereupon the said *Martha* became seised as of freehold for her life of the said lands, and the plaintiff became entitled to the said annuity or yearly rent, and afterwards the said *Martha* married the other defendant *Jiggs*, whereby they became seised of the lands as of freehold in right of the said *Martha* for her life, and so the plaintiff avers that while they were so seised, and were the perners of the profits thereof, 75*l.* of the said annuity or yearly rent, for seven years and a half, ending on the 25th of *March* 1814, became due from the defendants as the perners, and still is in arrear and unpaid, whereby *actio accrevit*, &c.

Demurrer. Joinder.

Richardson in support of the demurrer made three points, 1st, that debt does not lie in this case at the common law. And he took this distinction, that if an annuity be granted *for years* debt lies for the arrears, so if for life, or *pur autre vie*, *after the estate determined* debt lies. But by the common law debt does not lie for the arrears of a rent or annuity in fee, fee tail, or for life, so long as the estate of freehold has continuance." And for this he cited *Oguel's case* (a), *Com. Dig. Debt*, (A. 6, 7.) *ibid.* (B), also 1 *Rol. Abr.* 594 (G), *pl.* 1. to the same effect. And the reason given is, because the law will not suffer a real injury to be remedied by an action merely personal (b). Whether this reason be satisfac-

(a) 4 *Rep.* 48. b.(b) 3 *Bl. Com.* 232.

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tory or not, it is enough that the rule of law is so; and the party is not without his remedy, for an assise of mort d'ancestor (*a*), or novel disseisin (*b*), will lie, or the writ de consuetudinibus et servitiis or the writ of cessavit (*c*). In many cases, indeed, according to *Lit. sect.* 219. "the grantee of a rent charge may choose whether he will sue a writ of annuity against the grantor, or distrain for the rent behind;" and Lord Coke says upon that (*d*), "the grantee hath election to bring a writ of annuity and charging the person only, to make it personal, or to distrain upon the land and to make it real." But that is to be understood of a rent granted by deed, which charges the person, and for which a writ of annuity doth lie; but not as in the case at bar where there is not any charge upon the person. 2dly, If debt does not lie at the common law neither does it by stat. 8 *Anne*, c. 14. s. 4. For that statute applies only to cases between landlord and tenant for rent arrear upon a lease or demise for life or lives; which this is not. Admitting that a lease may be created by will (*e*) as if the land were devised to one for life, reserving a rent, and the reversion to another, such a devise might operate as a lease, and give the reversioner the remedy of this statute; yet here is neither lease or demise, nor lessor or grantor, neither is there any privity between the parties. 3dly, This action, suposing it maintainable at all, doth not lie against husband and wife, but against the husband only. Which is plain from this consideration, that during the husband's life he has the whole pernancy of the profits, and for the rent arrear during his life his executors and not the wife shall be chargeable, though the land itself is

(*a*) *Fitzb. N. B.* 195.(*b*) *Ib.* 178.(*c*) *Ib.* 208.(*d*) *Co. Lit.* 144. b.(*e*) 2 *Leon.* 33. *Machel and Dinton's case.*

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chargeable. Thus in *Oguel's* case (a), one was grantee for life of a rent out of the moiety of a manor, of which moiety a man was seised jure uxoris. The rent was in arrear, and grantee died, and his executors brought debt against the husband only for the arrearages. And it was resolved that by the death of the grantee, the grant for life was turned into the nature of a debt. And forasmuch as the husband took the profits of the land charged with the rent when in arrear, he only without his wife shall be charged in an action of debt. And after his death debt lies against his executors. So *Com. Dig. Baron and Feme* (Y), "Debt lies against husband alone for rent incurred during the coverture, upon a lease to the wife dum sola," and cites *Thoms. Entr.* 117.

Gifford contra admitted the rule of the common law to be against the bringing an action of debt so long as the freehold continues; but that he said was only where the freehold is conveyed at the common law, and not where it is by devise, which is by the statute of wills; for to such conveyances none of the writs of assise or other real writs apply. Therefore the plaintiff in this case will be without remedy if he may not maintain this action. And if it were necessary in order to maintain it, that there should be a charge on the person, here the defendant is charged with the payment of the rent, for the land is devised to her, *she paying thereout to the plaintiff the said rent*, which charges the person as well as the land. And what Lord *Holt* said in *Exer v. Jones* (b) is decisive in favour of this action, and he said that he made no question of it.

(a) 4 Rep. 49. b.

(b) 2 Ld. Ray. 937. 2 Salk. 415. 6 Mod. 27.

2dly, This action is maintainable by the statute of *Anne*, for it is within the mischief, and therefore within the intent of the statute, though the words thereof be only *lease or demise*. And oftentimes the courts have extended the provisions of a statute to cases which were not within the letter, if they were within the mischief (*a*); for instance, the statute 9 *Ed. 3. c. 3.* which gives an action against executors, is extended by equity to administrators, because they are in the same degree. So the statute of *Glocester* gives an action of waste against tenant for life or years; yet by the equity thereof it lies against him who holds but for a year, or for 20 weeks, for though this be out of the words of the act, it is within the intent (*b*). And by parity of reason the court ought to extend the remedy of this statute to the present case, it being plainly the intention of the statute to give an action of debt for rent arrear during the continuance of any estate for life or lives, and therefore though the letter says upon a *lease or demise*, yet by the equity, it shall be intended *by will* also. 3dly, Although the husband might have been sued alone yet may the wife be joined; in like manner as for rent upon a lease for years or life, made to husband and wife, an action lies against both, because it is for the wife's benefit (*c*). So here the freehold is in the wife jointly with her husband, and it is for her benefit, and after the husband's death she could not waive it.

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Richardson in reply said there was no reason why the common law writs should not lie for the recovery of the rent in this case, as well as upon a conveyance at the

(*a*) *Plowd.* 467.(*b*) *Ib.*(*c*) 1 *Rol. Ab.* 348. X.

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common law, so far at least as they were applicable to a taking by purchase and not by inheritance ; as novel disseisin, where the writ shall be general, *that unjustly, &c. he hath disseised him of his freehold, &c.* For when a statute, as the statute of wills, gives a new right, it gives all such remedies for the recovery of that right, as by law may be applied to it. And a rent, whether created by will or grant, will pass by a common recovery, &c. which shews that it may be the subject of a real action. And notwithstanding what fell from Lord *Holt* in *Ever v. Jones*, there is no instance of an action lying for a legacy chargeable on land. *Deeks v. Strutt* (a) shews that it will not lie for a legacy generally, and the reason there assigned holds equally where the legacy is charged on land. Besides this is not a legacy but a rent. And as to this action being within the equity of the statute of *Anne*, such a construction of an act of parliament might well obtain formerly, when the legislature was used to express its intention sparingly, in a few words or sentences only ; but in modern times, since it has become the practice to express such intention fully and at large, so that it may be found within the four corners of the act of parliament, it is unnecessary, and would be highly dangerous to extend it by any intendment. And therefore that doctrine is properly exploded. Upon the last point he admitted, that according to the authorities it rather seemed that the action would lie both ways.

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. After stating the pleadings, His

(a) 5 T. R. 690.

Lord-

Lordship said, This demurrer was argued at our sittings before *Hilary* term in *Serjeants' Inn Hall*, when it was contended on the part of the defendants, in support of the demurrer, that at the common law an action of debt will not lie for a rent or annuity in fee, in tail, or for life, while it continues a freehold interest. And this position was not denied on the other side, but it was contended that it applied only to legal common law estates, and not to devises by will; and what appears to have been said by *Holt* C. J. in *Ewer v. Jones*, reported in 2 *Ld. Ray.* 937., *Salk.* 415., and 6 *Mod.* 26, 27., was relied on, viz. "That a devisee may maintain an action at common law against the terre-tenant for a legacy devised payable out of land. For where a statute, as the statute of wills, 32 & 34 *H.* 8., gives a man a right, he shall have an action to recover it of consequence; because his right is created by act of parliament." But what Lord *Holt* is there stated to have said does not reach this objection; it is said only generally of a legacy or sum of money, not of an annuity or rent for life, in tail, or in fee; and it is to be observed, that in the case of a legacy payable out of land, unless the legatee had his remedy by action of debt, founded on the statute, he would be wholly without remedy in the courts of common law; whereas the annuitant would not be remediless, but would have an assise to recover his annuity (a). And no authority has been stated where the general rule of law, which excludes the action of debt as a remedy for rent or annuity in fee, in tail, or for life, has been confined to annuities or rents created by common law conveyances, as contradistinguished from

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(a) See *Bredimen's case*, 6 *Rep.* 56. b.

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annuity or rents created by devise, nor does there seem any reason for making the distinction. It was next contended on behalf of the plaintiff, that this case was within the provisions of the 4th section of stat. 8 *Ann. c. 14.* "for the better security of rents, and to prevent frauds by tenants;" but the language both of the title of the act, and of the enacting clause, shews that the legislature contemplated only the case of rent due from a tenant, holding by lease or demise under his landlord; which is not this case; this being the case of two distinct and independent devises, of the land to one person for life, and to another of an annuity issuing out of the same for the life of the devisee of the land, created by the will of one and the same devisor, and without any such original privity between the devisee of the land charged with the annuity, and the devisee of the annuity charged thereupon, as subsists between a lessor and his lessee. We are therefore of opinion that the action of debt is not maintainable on the ground of this stat. of *Ann. c. 14.* any more than it is upon the other ground already considered.

Wednesday,
May 3d.

WILSON and Another *against* HOBDAV.

Debt lies by the assignees of a replevin bond against one of the sureties in the *detinet* only.

And where they declared that at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of *W. H.* for rent, and that *W. H.* at the said city made his plaint to the mayor, &c., and prayed deliverance, &c.; whereupon the mayor took from him and the defendant, and another person a bond, which they all three executed, conditioned for *W. H.* appearing before the mayor or his deputy at the next court of record of the city, and there prosecuting his suit, &c.; and thereupon the mayor replevied, &c.: Held that it was not ground for special demurrer, that the declaration did not shew a custom for the mayor to grant replevin, and take bond, and did not shew that plaint was made *in court*.

DEBT by the plaintiffs as assignees of a replevin bond against the defendant, one of the sureties. The plaintiffs declare against the defendant of a plea that

he

he render 7*ol.* which he unjustly detains, &c., for that on the 5th of *July* 1813, at the city of *Canterbury*, and within the jurisdiction of the mayor of the said city, they distrained the goods of one *W. H.* for rent arrear, and that *W. H.* afterwards, within five days, at the said city made his plaint to *W. S.* then being mayor of the said city, of the taking and detaining thereof, and prayed that the same might be forthwith replevied by the said mayor, and delivered to the said *W. H.*, whereupon the said *W. S.* so being mayor according to the form of the statute, took from the said *W. H.*, from the defendant, and one *W. W.*, a bond in double the value of the goods, the value being first ascertained by the oath of a witness, which bond the said *W. H.*, the defendant, and *W. W.*, executed to *W. S.* so being mayor, &c., conditioned for *W. H.* appearing before the mayor or his sufficient deputy at the next court of record of our lord the king to be holden at the *Guildhall* of the city on *Monday* the 19th of *July*, and there prosecuting his suit with effect, and making return of the goods, if the same should be adjudged, and thereupon the said mayor at the prayer of *W. H.* replevied and made deliverance to the said *W. H.* according to the duty of his office, and so the plaintiffs aver that although on the 19th a court of record was holden, &c. yet the said *W. H.* did not appear and prosecute, &c. whereby the bond became forfeited, and the said mayor afterwards assigned it to the plaintiffs according to the form of the statute, &c.

Demurrer assigning for cause (*inter alia*) that the plaintiffs in the commencement of their declaration have not alleged that the defendant owed to them the sum of money therein specified, but only that he hath detained

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detained the same, whereas they ought to have declared in the debet and detinet; also that the sheriff of the city and county of *Canterbury* hath by law authority to grant replevin of goods distrained for rent, and to take a replevin bond, and not the mayor of the said city, nor have the plaintiffs shewn any special custom or law authorizing the mayor to grant replevin, or take or assign the said replevin bond; also that the plaintiffs have not shewn that the said writing obligatory was made and given to the mayor of the city of *Canterbury* within the jurisdiction of the said mayor's court; also that the declaration is in other respects uncertain, &c. Joinder.

Marryat argued in the last term (a) in support of the demurrer, and took two exceptions; 1st, that the Plaintiffs ought to have declared in the debet and detinet. And he said the rule was this, where a man sues in his own right and for his own benefit, he ought to sue in the debet and detinet; and so he ought, though the obligation be not originally made to him by the person whom he charges with the payment of it; and if the charge be against such person in the detinet only, he may demur to the declaration; *Gilb. Debt.* 401, 402. And before the statutes of jeofails, 18 *Eliz.* c. 4. 16 & 17 *Car.* 2. c. 8. it was ground of error, and many judgments were reversed for this and for the like cause, namely, if it was in the debet and detinet when it ought to have been in the detinet only; *Walcot v. Powell* (b). *Reynell v. Langcastle* (c). *Salter v. Cobbold* (d). *Holdin v. Sutton* (e). *Woodcock v. Morgan* (f). But since the stat.

(a) *Dampier* J. was absent when the case was argued. (b) 3 *Leon.* 206.

(c) *Cro. J.* 545.

(d) 3 *Leon.* 74.

(e) 1 *Ld. Ray.* 698.

(f) 6 *Mod.* 306.

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4 *Ann. c. 16.* advantage must be taken by demurrer, for if the party does not demur, it will be cured by verdict; and so it was adjudged in *Lee v. Pilmy (a)*, which was after the 4th of *Anne*, that the defect was aided after verdict by that act. But here the party has demurred. 2dly, It is not shewn that the mayor of *Canterbury* had any authority to take a replevin bond. The stat. 11 *Geo. 2. c. 19. s. 23.* directs sheriffs and *other officers having authority* to grant replevin, to take bond, &c.; and in the case of a sheriff, it is unnecessary to shew his authority, because he has a general one. But even a sheriff, at the common law, could not grant replevin, except upon a writ directed to him from the superior court; and then only in his county court. However, it having been found inconvenient that the goods should be detained from the owner until the next county court, the statute of *Marleb. (52 H. 3. c. 21.)* enabled the sheriff upon plaint made to him, without writ, out of court, to make replevin (*b*); but that is an authority confined to the sheriff, and derived to him entirely from this statute. Other officers, indeed, beside the sheriff, may by custom or prescription grant replevins, but with this difference, that they can only do it by process in court after a plaint entered, for the statute does not extend to them. And therefore in *Hallet v. Byrt (c)* a prescription for a steward of a hundred court to grant replevin out of court, upon a parol complaint made to him, was adjudged to be void. In *Bac. Abr. (d)*, where the authorities upon this point are collected, the disagreement

(a) 2 *Ld. Ray.* 1513.(b) 2 *Inst.* 139.(c) 2 *Salk.* 580. *Carth.* 380. 1 *Ld. Ray.* 218. *Skin.* 674. 5 *Mod.* 252. 12 *Mod.* 120.(d) 5th edit. *Replevin*, (C.)

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between the different reports of that case is noticed, but the result seems to establish the above distinction in respect of the sheriff and other persons. And conformably to this distinction the plaintiffs in this case ought to have shewn by their declaration not only that plaint was made to the mayor, but that it was made in court, for otherwise it must be taken that it was out of court; and they ought farther to have shewn some custom or prescription for the mayor to hold plaint and grant replevin. For unless he is to be taken to have authority, quâ mayor, to act in these respects, the naming him mayor, and alleging that plaint was made to him, without shewing by what authority he held plaint and granted replevin, and also took and assigned this replevin bond, is insufficient.

Taddy contra, having been directed by the Court to confine himself to the last objection, in order to shew that the granting replevins was not confined to the county court, referred to stat. *Westm.* 2. c. 2. (13 *Edw.* 1.), the words of which are, “vel aliam curiam;” and Lord *Coke*’s comment upon them is thus, “so as lords of hundreds, wapentakes, &c. may have power to hold plea of replevin,” &c. (a) So in *Fitz. N. B.* (b) there is a writ of recaption for a distress taken, after replevin made by the bailiffs of the lord of N., and pending plea of replevin in his wapentake. And admitting that the hundred court and such like courts could only proceed by plaint in court, according to the common law, and not by the statute of *Marlbr.*, yet the plaintiffs in this case have well declared, for it is consistent with this de-

(a) 2 *Inst.* 339.

(b) 73. B.

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claration, that the plaint was made in court, and the defendant shall not be allowed upon demurrer, after that he has consented to become surety, and has obtained a deliverance for his principal, as if the proceeding was lawful, to turn round and aver that it was unlawful, in order to rid himself of his obligation. And so this case is distinguishable from *Hallet v. Byrt*, for that was trespass for taking, &c. where the defendant must justify, and shew a clear title; but this is against a surety, who stands in the same situation as the principal, upon his bond, and the condition of the bond is for the principal's appearing at the next court of record, and there prosecuting his suit, &c.; therefore the very condition shews that there must have been a proceeding in court, for otherwise it would be a nullity. And it is a maxim in pleading, that the plaintiff is not bound to affirm any thing which the defendant is estopped from denying.

Marryat in reply observed, that no argument ought to be drawn to the prejudice of the defendant from the form of the condition, because it was the form prescribed by stat. 11 G. 2. c. 19. s. 23., and more especially as it was directed to be used, and was used in cases where deliverance was made upon plaint to the sheriff out of court. It would therefore be strange to hold that it recognized a proceeding in court.

LORD ELLENBOROUGH C. J. said that upon the first point there did not seem to be any doubt. Upon the principle that a man may complain of only a part of his grievance and not of the whole, so these plaintiffs might abridge their demand, and declare in the detinet only, instead of the debet and detinet. And that
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formed a great distinction from declaring in the debet and detinet, where the party ought to have declared in the detinet only, for in that case he extends his own demand instead of abridging it. Upon the other point the Court would further consider.

Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This was an action by the assignees of a replevin bond, and two objections were made upon demurrer, one that the action was in the detinet only, whereas it should have been in the debet and detinet, the other, that the replevin was granted and the bond assigned by a person who, as far as appeared upon the pleadings, had no authority so to do. The first objection was disposed of upon the argument, the other remains to be considered. The plaintiffs declare as assignees of the mayor of *Canterbury*, and the declaration states that the goods were distrained within the jurisdiction of the mayor, that the owner made his plaint to the mayor of the taking, &c., and prayed that the goods might be replevied by the said mayor and delivered to such owner, that thereupon the mayor, according to the form of the statute, took bond from the owner and the defendant and another surety, conditioned for prosecuting the owner's suit with effect for taking and unlawfully detaining the goods, and for making a return, if a return should be awarded, and that thereupon the mayor at the prayer of the owner replevied and made deliverance of the goods to the owner according to the duty of his office. Upon this statement it is assumed that the plaint to the mayor was made out of Court, and it is insisted not only that

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that no authority is shewn in the mayor to grant replevin, but that he could not by law have the authority he here exercised, and for the latter of these positions reliance is placed upon the case of *Hallet v. Byrt*. Why we are to assume that the plaint was made to the mayor out of court, if by law he could not properly take it but in court, we are not told; and as the mayor is stated to have acted throughout at the prayer and instance of the owner, for whom this defendant is surety, and with whom for this purpose the defendant is identified, we think we are bound as against this defendant to presume, at least till the contrary is shewn, that these goods were duly and legally replevied by the mayor, if under any circumstances he could duly and legally replevy them. The owner of the goods made his plaint to the mayor, and it was not necessary or likely that the plaintiffs in the action on the replevin bond (whose taking is complained of) should be present at the time of making that complaint. It lies therefore in his, the owner's, particular knowledge when, how, and where the plaint was made; and if there were any objection to the place or manner of making it, the defendant, his associate and surety, should have stated it by way of plea. The owner of the goods by his own application, and by the instrumentality of this defendant and the other surety has had all the benefit which could have resulted to him from a valid replevin. They by their acts have assumed that the mayor was the proper person to grant the replevin, and they have in fact, as alleged, procured a replevin from him; and is it reasonable that they should now desire the Court to assume that the replevin was improperly and unwarrantably granted, or that they (without bringing forward any thing on their

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their part affirmatively to impeach it) should complain that the plaintiffs have not averred every particular necessary to render it valid? Considering that it was brought about at the instance and application of the owner and his sureties, and that they have derived from it all the benefits which they could have done from the most valid replevin, we are of opinion that we are bound as against this defendant to consider it *primâ facie* as valid, that is, till it is successfully impeached by the defendant. The authority brought forward in order to impeach it is *Hallet v. Byrt*, 5 *Mod.* 248. and which case is likewise reported in *Ld. Raym.* 218. *Salk.* 580. and *Skinner*, 674. From a review, however, of the reports of that case, it will be found that the principal point under consideration was the course of replevying in a hundred court, that the Court took upon itself to decide what must be such course, because every hundred court is derived out of the county court, and can have no power which the county court has not, and because as the powers of a county court depend not upon the particular charters by which each court may happen to be constituted, but upon the jurisdiction and course of proceeding generally incident to that description of court at common law, every superior court must know what is the jurisdiction and legal course of proceeding in such courts throughout the realm. It concludes nothing, however, as to courts which owe their jurisdiction, not to the common law, but to particular charters, or to prescriptions, which presuppose such charters, and where the extent of jurisdiction, and the course of proceeding, may depend entirely upon the terms in which the franchise was originally granted. That other inferior courts may have a prescriptive

right to hold *plea of replevin by plaint*, though hundred courts cannot, is admitted by the note in *Carth.* 382. and is evident from *Fitz. Nat. Brev.* 70. B. where it is said, “and if a replevy be sued by plaint in the court of *any other lord* than in the county court before the sheriff, then the recordari which is sued by the plaintiff or defendant shall be directed unto the sheriff, and the writ shall be such, &c.” See the writ stated in *Fitzh.* 70, 71., in which the command to the sheriff is to “go to the court of *W. de C.* (*i. e.* the court of some individual lord as distinguished from a county or hundred court,) and in that full court to cause to be recorded the *plaint which is in the same court without our writ* ;” clearly shewing that a writ of replevin might be depending in such court, by plaint without the king’s writ. And in the Year-book 29 *E.* 3. 31. there is an instance of a plea in replevin depending in the court of the manor of *Wallingford*, and of deliverance thereupon made without writ. And in 12 *H.* 7. 18. it is said by *Fineux C. J.* that a man may prescribe to have a court baron, and in it to have and to hold pleas in *vetito namio*, and to hold plea in replevin. We are therefore of opinion that the case of *Hallet v. Byrt* is to be confined to replevins in hundred courts, which courts are all *ejusdem generis*, and owe their jurisdiction to the common law, and that it does not furnish a rule for replevins in other courts which owe their origin and jurisdiction to charters from the crown, and in which pleas of replevin upon plaint and without writ might be maintained. And as the mayor of *Canterbury* might by legal possibility have had full power to do all he did, we think we are not at liberty upon

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the facts stated to presume in favour of this defendant that he had not, and that consequently there must be judgment for the plaintiffs.

Wednesday,
May 3d.

FORD, Widow, and Another, Executors of H.
FORD, Clerk, deceased, *against* RACSTER. (a)

Oak wood of more than 20 years' standing, not growing from acorns, but from old stools, which stools belonged originally to trees which had stood more than 20 years, were held not to be so clearly entitled by stat. 45 *Ed.* 3. c. 3. to exemption from tithe, as to make a verdict which subjected them to tithe a wrong verdict.

DEBT on the stat. 2 & 3 *Ed.* 6. for not setting out tithe of coppice wood, being *sylva cædua*, &c. Plea, *nil debet*. At the trial before *Dallas J.* at the last summer assizes at *Hereford*, the case was thus:

The woodland in question consisted of a number of acres of oak coppice; the whole of which, by a regular rotation of cutting a part every year, came to be cut down once every 15 years. A great proportion of this coppice grew out of old stools, and many of these growers were passed by and left standing at the falling of the coppice, some for two, and many for three and even until the fourth falling. These were denominated black poles, and were of considerable height and dimensions, being from 2 to 5 inches in girth, and in height from 30 feet upwards. The stools from which they grew were many of them, according to some of the witnesses, the stools of trees as old as the wood itself, which had been a wood for centuries, and all were stools of trees above the age of 20 years before they were cut down, and the black poles also all exceeded that age. These black poles were barked before felling, and then cut for laths and posts and rails, and into timber for carpenters' pur-

(a) Cause was shewn at *Serjeants' Inn* before last *Hilary* term, in the absence of *Dampier J.*

poses.

poses. Woodlands of this description had usually paid tithe of the black poles as well as the rest, which had been the case with the woodland in question, composition having been paid for the whole. Most of the witnesses proved that these black poles were not accounted timber in that country, some of them stating that nothing was timber but what is six inches in girth, whether it grew from the acorn or not; and others, that nothing which grew from stools was accounted timber. The question was, whether the black poles, as well as the coppice, were liable to pay tithe. The counsel for the plaintiffs mentioned a case of *Lewis v. Snell*, in which they said the Court of Exchequer had lately decided that germins as well above the age of 20 years as under were subject to tithe.

The learned Judge left it to the jury upon the evidence whether the black poles were titheable, stating that if it was a kind of wood exempted by the statute (a), it would be so at the age of 20 years, of which age the black poles appeared to be, but at the same time intimating his opinion to them that they were not timber trees. And he added, that where germins grew from old stools they were subject to tithe, and that he understood the case, as cited by the plaintiffs' counsel, to have determined that such germins were so subject, whether of the age of 20 years and upwards, or not. The jury found for the plaintiffs, and on giving their verdict said that black poles had always paid tithe in their country.

A rule nisi for a new trial having been obtained in the last term, upon the ground that this was a species of wood exempted from tithe by stat. 45 *Ed.* 3. c. 3.,

(a) 45 *Ed.* 3. c. 3.

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Abbott and *Puller* (with them *Dauncey*) shewed cause, and they said, that though the witnesses did not distinguish between the proportion of black poles growing from stools, and such as grew from their own root, yet the verdict would be right provided any part was titheable; for if the owner intermix in cutting, such as is not titheable with that which is, he shall pay for the whole (a). Therefore taking the question to be simply whether the black poles growing from stools ought to pay tithe, they relied on its being found by the jury that wood of this description had always paid tithe in that country, and cited *Walton v. Tryon* (b) for the contradiction given by Lord *Hardwicke* to the position in 2 *Inst.* 643., “that the germins growing out of the roots of timber trees before then cut down are exempt from tythes.” Lord *Hardwicke* also defines “*gros bois*,” which are the words of the stat. 45 *Ed.* 3., to mean “trees of 20 years’ growth, whether timber at common law or by custom (c).” And thus in *Turnor v. Smith* (d) the Court took the distinction between underwood and wood growing on stubs or stems, decreeing as to them that an account should be taken; and what were standards, (or standills, as called in stat. 35 *H.* 8. c. 17.) which are properly young trees springing from the seed, and as to them made no decree. Also *Walbank v. Hayward* (e), (the report of which agrees with *Skinner’s* brief who was of counsel in it,) proceeded upon the same distinction, for there the Court directed inquiry as to what part of the wood grew from the mast

(a) Per Lord *Hardwicke* in *Walton v. Tryon*, 6 *Bac. Abr.* 5th edit. 721.

(b) *Ambl.* 133. 2 *Gwill.* 832. 3 *Burn’s E. L.* 452.

(c) *Ambl.* 132. 2 *Gwill.* 839. (d) 2 *Gwill.* 529.

(e) 3 *Wood.* 512.

and

and was under 20 years, and what part from stools or roots of trees, heretofore fallen of any age, size, or growth whatever, and yet it appeared that wood of this description had never paid tithe before; so that it is an authority a fortiori in support of the present case where the wood has always paid tithe. So in *Lewis v. Snell*, which was also a new claim, and was before the Exchequer in 1811, the great question was whether wood above the age of 20 years growing from stools was exempted from tithe; and the Court held that it was not, and made a decree referring it to the officer to take an account (inter alia) of what germins were cut by the defendant from stools of trees above 20 years' growth, and whether any and what part cut from stools above 20 years' growth were cut and mixed with coppice and underwood; and also of the bark that had been stripped by the defendant from any trees except timber trees.

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The Attorney General and Jervis contra, maintained that the verdict passed upon an erroneous impression of the jury, that nothing was timber but wood of a certain girth; whereas the rule was, that if a tree, being timber of 20 years' growth, is once privileged, though it be afterwards lopped every 15 years, yet is tithe not payable of the loppings. And it matters not whether the tree be of the height of one foot or 20, if it be the parent stock; therefore if the tree be cut down leaving the stock, if the stock is privileged, so shall the germins above the age of 20 years, which grow from it, be privileged. And this seems to have been the opinion of the Court in *Soby v. Malins* (a). It must also

(a) *Plowd.* 470.

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be remembered that this species of tithe was not payable of common right, but by the constitution of *Stratford*, (17 *Ed.* 3.) of which the commons frequently complained to the king, until at length the stat. 45 *Ed.* 3. was passed, exempting what is termed by the statute gross wood, of the age of 20 years; from the record of which statute (a) it appears that it was at that time understood that underwood only was comprized in the words *sylva cædua*, and not trees of such age. For which there seems to be good reason, for trees above the age of 20 years, as it was argued in *Soby v. Molins*, are an inheritance, and for cutting them down a man shall have waste, and shall count to his disherison. And if the trees are an inheritance, it follows that no tithe shall be paid of them, for tithes are payable of the increase of the inheritance, and not of that which is the inheritance itself. And as to Lord *Hardwicke's* dissent in *Walton v. Tryon* from the rule in 2 *Inst.* he does not give a very good reason for it, viz. because it would deprive the clergy of tithes of many underwoods; nor does he seem to have acted upon it in the principal case before him, for he directed an issue to another point, namely, whether the oak and ash pollard trees in question were first topped before they were of 20 years' growth or not (b). Nor does *Turnor v. Smith* apply to this case, because that turned upon its being a promiscuous felling of coppice wood with that which grew from stubs or stems. *Walbank v. Hayward* was concerning the liability of beech wood, and *Lewis v. Snell* is still sub judice. But in *Aubrey v. Fisher* (c) the rule was laid down that upon a question whether any particular wood is

(a) See 1 *Gwill.* 5. note to stat. 45 *Ed.* 3.(b) 2 *Gwill.* 840.(c) 10 *East*, 446.

or is not timber, the inquiry is confined to the nature of the wood, and the period of its growth, whether of 20 years; by which rule if this question be tried, the wood will be found in both respects to be of the quality of timber.

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Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This case came before the Court upon a motion for a new trial. It was an action of debt on the stat. 2 and 3 of *Edw.* 6. for tithes of wood, and the question was, whether the jury had not improperly treated as titheable certain wood which under the statute of 45 *Edw.* 3. c. 3. was exempt from tithes. This was oak wood of more than 20 years' growth, not growing from the acorn, but from old stools, and those stools belonging to trees, which trees before they had been cut were of more than 20 years' standing. Some of the witnesses upon the trial spoke to the girth of the wood, as supposed to afford the proper criterion for determining whether it was timber or not, which was clearly referring to a wrong standard, and it was suggested upon the argument that this probably might have led the jury into a mistake; but as the learned Judge told the jury upon his summing up, that if the species of wood was such as to entitle it to exemption, it would be entitled to exemption as soon as it was 20 years old, and as the jury stated when they brought in their verdict that this wood always paid tithe in their country (which never could be true as to oaks growing from acorns) the verdict could not have proceeded upon this false standard of the girth, but must have been found upon the nature and character of the wood. The question therefore is, whether oak wood, of more than

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20 years' standing, growing not from acorns as original or maiden trees, as they are called, but from old stools, which stools belonged originally to trees which had stood more than 20 years, are so clearly and universally entitled to exemption by the statute, as to make a verdict which subjects them to tithe, necessarily a wrong verdict. And we are of opinion that they are not so entitled, and consequently that the verdict which has subjected them to tithe is not necessarily a wrong verdict. The statute 45 *Ed. 3. c. 3.* states it as the complaint of the great men and commons, "that whereas they sell their great wood (*leur gros boys*) of the age of 20 years, or of 40 years, or of greater age, to merchants to their own profit, or in aid of the king in his wars, parsons and vicars of holy church implead and draw the said merchants in the spiritual court for the tithes of the said wood, in the name of this wood called *sylva cædua*, whereby they cannot sell their woods to the very value;" and then the statute ordains "that a prohibition in this case shall be granted." This statute therefore does not import to exempt all wood of 20 or 40 years' growth, but such only as comes under the denomination of "great wood," or "*gros boys*." Two things therefore must concur to exclude or privilege wood from a liability to tithes, viz. its being of the specified age of 20 years or more, and its being *grosbois*. *Grosbois* is not merely *hautbois*, as distinguished from *subbois*, but is a distinct subject from both. In the petitions in parliament, 21 *Ed. 3. 37.*, the three kinds of wood, *hautbois*, *subbois*, and *grosbois* are mentioned; and as to the latter, viz. *grosbois*, the petition treats it as a clearly untitheable subject; for the commons pray that the people of holy church may be forbidden to demand tithe; as to the former two descriptions of wood they

they pray only that the clergy, in right of tithes of *haut-bois* and *subbois*, may demand or attempt nothing new, but only that (*ceo*) and in those places (*en les lieux*) where they have been of ancient time seised as in right of their churches. *Sylva cædua*, and *subbois*, or underwood, are not, it should seem from stat. 45 *Ed.* 3. synonymous; for *subbois* is stated to be comprehended in it, not to be it itself, or to be the same thing with it. *Sylva cædua* seems to comprehend *vi termini*, besides underwood, all such wood as is occasionally cut either in body, branch, or root, with the statutable exception only of *gros bois* properly so called, when it is of that age at which it is by the stat. 45 *Ed.* 3. exempt from being tithed, i. e. of 20 years or upwards. *Gros bois* is considered by Lord *Coke* in 2 *Inst.* 642. as signifying what is by common law or the custom of the country timber. The exemption naturally and by legal consequence embraces whatever constitutes a part of the *gros bois* or timber of the requisite age, but it will not comprehend that which never made a part of or co-existed with the *gros bois* of the due age. It will therefore not comprehend the *germins* which sprung from the tree, and are cut before it was statutably *gros bois*, nor the wood which grew from the stool on which the *gros bois* once stood, but stands no longer, which is the case with the black poles in question, nor the *germins* which sprung from the root of what was once the root of *gros bois*. To be privileged it must have been once an accessory to a then existing and privileged principal matter of *gros bois* of 20 years' growth at the least. The position in 2 *Inst.* 643. "If a man cut down timber trees, tithes shall not be paid for the *germins* or branches which grow out of the roots, of what age soever, for that

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that the root is parcel of the inheritance, has a bad reason assigned for it; for every tree of whatever age, and every part of every tree growing, is properly part of the inheritance, and the authorities, cited in the margin, viz. *Plowd.* 470. and *11 Co.* 49. are not sufficient to support the position. In *Plowd.* 470. the question whether germins growing out of the old stools were tithable, where the tree itself was cut down, did not arise in that case, and the dicta there relate rather to what grew from the trunk, where the tree was not itself cut down, viz. the loppings and germins of hornbeam pollengers, than to what grew from the old root; and what is said in *11 Co.* 49. from the date assigned to the determination relied upon, i. e. *Pasch.* 29 *Eliz.* refers probably to nothing more than an opinion of *Wray* and *Clench*, which is to be found in *Cro. Eliz.* 57. and *Moor*, 908., and which are both of *Easter*, 29 *Eliz.*, which opinion in another part of it, where it says that of oaks cut under 20 years of age no tithe is due, is clearly wrong. The passage therefore in *2 Inst.* 643. may be considered as standing upon no prior authority, and in later times it has certainly been impeached. In *Walton v. Tryon*, *Ambl.* 133. *2 Gwill.* 832. and *Burn's Eccl. Law*, (1751.) Lord *Hardwicke* says, "*2 Inst.* 642, 3. lays down some general rules, which have not been contradicted, except in the case of germins growing from the stools of trees that have been entirely cut down; and this with reason, because great part of the coppices or underwoods of the kingdom are germins from such stools of timber woods, and it would deprive the clergy of tithes of many underwoods. It was asked, says he, what difference, whether germins grow out of the stools of trees entirely cut down, or from the head after

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after it is lopped? In answer, there is great difference; for as to germens from stools there are no trees remaining from whence they can derive the privilege, in the other case there are." Here there is not only Lord *Hardwicke's* own opinion on the point, but an assertion by him that this rule of Lord *Coke's* had in later times been contradicted. And there are two cases since in which it is clear Lord *Coke's* rule has not been followed. In *Amber v. Jackson*, 3 *Wood*, 225., in 1769, tithe of this very description of wood was decreed in the adjoining county of *Salop*. The question, as may be collected from the pleadings, was, whether tithes were to be paid for 873 black poles, of considerably more than 20 years growth: the rector insisted that they grew from old stools, the owner that they grew from their own roots; witnesses were examined on both sides, and counsel heard, and these trees were adjudged tithable. This therefore is an authority in point, in modern times, upon this very description of tree in an adjoining county, and the Judges who concurred in it were *Parker C. B.* and *Smythe* and *Adams Bs.* *Walbank* and *Hayward*, 3 *Wood*, 512. is nearly to the same effect. And upon this authority, following as it does the opinion of Lord *Hardwicke*, and contradicted by nothing but the questionable dictum in 2 *Inst.* 643., we think we cannot say that the verdict in this case is wrong; and the rule for a new trial must consequently be discharged.

Rule discharged.

1815.

Wednesday,
May 3d.WARWICK *against* BRUCE.

The Court refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action, and the rule nisi having been obtained upon the defendant's own affidavit alone, they discharged it with costs.

THE plaintiff in an action against the defendant obtained a verdict for 150*l.*, and had judgment, upon which the defendant brought error, and after argument judgment was affirmed. But before the case came on to be heard in error, the defendant preferred an indictment against two of the plaintiff's witnesses for perjury in their evidence at the trial, and on a former day in this term obtained a rule nisi for staying execution upon the judgment until the trial of this indictment, upon an affidavit made by himself charging the said witnesses with perjury.

Topping shewed cause; and *Moore*, in support of the rule, cited *Fabrilius v. Cock* (a), *Lister v. Mundell*. (b)

But per Lord ELLENBOROUGH C. J. It would be highly dangerous to allow this rule to be made absolute. For this would be a receipt to every person after verdict and judgment against him, how to delay the fruit of such judgment by indicting some of the plaintiff's witnesses for perjury. And should this rule be made absolute it would perhaps prevent the plaintiff from being a witness at the trial of the persons indicted. And because this seemed to be a new and dangerous experiment the Court directed the rule to be discharged with costs.

(a) 3 Burr. 1771.

(b) 1 Bos. & Pul. 429.

1815.

POWER and Another *against* WHITMORE.Friday,
May 5th.

ASSUMPSIT on a policy of assurance on goods valued, on board the ship *St. Thiago*, at and from *London* to *Lisbon*, the interest in one *H. Teixeira de Sampayo*; and the plaintiffs declare that after the sailing and in the course of the voyage, the ship and her masts, tackle and apparel, were by the force of the winds and weather greatly damaged and broken, and in order to repair the damage and to enable her to prosecute and complete her voyage, the ship was forced, with the goods on board, to go into the port of *Cowes*, and there to remain for four weeks, and the owners of her were thereby forced to and did expend 500*l.* in pilotage, and other charges in going into and out of the said port, and in the paying, feeding, and maintaining the master and mariners while she was there so detained, and in raising and procuring money for those purposes, and that the ship being repaired set sail on the 29th of *December* 1810 with the goods on board, from *Cowes* upon her voyage, and afterwards in the prosecution of it was by the force of the winds and weather in imminent danger of being driven on shore, stranded, and lost, with the said goods on board, and the master and mariners, for the necessary preservation of the ship and cargo, and of their lives, and in order to avoid the

The wages and provisions of the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expences of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there, on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an im-

pending peril of being driven on shore and stranded.

The insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country), who is obliged by the decree of a court there, to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants, obtaining in the foreign country, to treat the same as general average, but such usage is to be collected merely from the recitals and assumption made in the decree.

impend-

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 POWER
 against
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impending peril, stood out to sea with the ship with a press of sail more than the ship was able to bear in such tempestuous weather, such press of sail being necessary and proper to carry the ship out to sea, and to keep her there, and to avoid the impending peril, and thereby and by means thereof, the masts, bowsprits, sails, and other tackle of the ship, were broken to pieces, blown away, and greatly damaged, and the ship was greatly strained and injured, and that the ship by the means aforesaid having escaped the impending peril, afterwards on the 8th of *January* 1811 completed her voyage and arrived with the goods at *Lisbon*, and the said *H. T. de Sampayo* was afterwards under the authority and orders of a certain court at *Lisbon*, having jurisdiction of divers maritime affairs, and of the settlement of general averages, established by the authority of the government of *Portugal*, ordered and obliged to pay 2000*l.* as contribution and general average, in respect of the expences, losses, and damages incurred as aforesaid. 2d count stated that the ship sailed on her voyage, and on the 8th of *January* arrived at *Lisbon*, (omitting the intermediate circumstances,) and that *H. T. de Sampayo* was afterwards under the authority and orders of a certain court at *Lisbon*, having jurisdiction, &c. ordered and obliged to pay and did pay 2000*l.* in respect of certain expences, losses, and damages incurred in the voyage mentioned in the policy. Money counts. Plea, general issue.

At the trial before Lord ELLENBOROUGH C. J. at the *London* sittings after *Trinity* term 1813 there was a verdict for the plaintiffs for 66*l.* 8*s.* 4*d.* subject to the opinion of the Court upon this case :

The insurance was effected by the order and on account of *H. T. de Sampayo*, a merchant of *Lisbon*, and

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a *Portuguese* subject. The ship being in every respect fitted for sea sailed with the goods from *London* on the 21st of November 1810, upon her voyage, and having encountered strong and adverse winds, and heavy seas, was on the 6th of *December* in sight of the *English* coast, when it was discovered that the bowsprit bitts had given way, occasioned by the heavy labouring of the ship then under her courses beating to windward, and in a most heavy and dangerous sea. The master being apprehensive that the ship, if she continued in that situation, would be in great danger, judged it prudent, after having consulted with his officers, to put into port, for the purpose of securing the bowsprit; and meeting with a pilot on the 7th he was enabled to bring his ship to anchor in *Cowes* roads on that day. All the damage was occasioned by the tempestuous winds, and weather, and heavy seas, and the putting into *Cowes* was a prudent and proper measure, necessary for the safety of ship and cargo, but that was a measure also occasioned by the same cause. The ship remained at *Cowes* till the 11th, when having repaired her damage she sailed on the voyage, but on account of adverse winds, and tempestuous weather, returned to *Cowes* the next day, and was detained there by adverse winds till the 29th, when she again sailed on her voyage. The case then stated the following items of expenditure :

Wages of the captain and crew from the	£.	s.	d.
time of her first putting into <i>Cowes</i> , to			
the time of her last sailing from thence	230	5	8
Provision consumed during the same			
period	-	-	-
	192	1	0
			Bow-

1815.	Bowsprit bitts repaired at her first putting	£.	s.	d.
Power	into <i>Cowes</i>	-	-	-
against	Three coils of rope supplied at the same		7	14
Whitmore.	time	-	-	0
			116	3
				0

The case also stated that in the course of the voyage from *Cowes* to *Lisbon* the facts took place, and the damages were incurred, as stated in the *first count*, and that upon the ship's arrival at *Lisbon* the master instituted proceedings in one of the courts of justice there, called the tribunal of *India* and *Mina*, (being a court established by the *Portuguese* government, and having jurisdiction in maritime affairs, and over the matters of that suit within the dominions of *Portugal*, and over *Portuguese* subjects,) against the proprietors of the cargo, and the owners and underwriters of the ship, for a contribution by way of general average to make good the damages and extraordinary expences incurred on the voyage, as before stated; of which suit the defendant and the other *British* underwriters on the cargo had no notice until after its termination. That the court at *Lisbon* decreed, conformably to the general maritime laws, and unalterable practice of *Lisbon*, in favour of the master's claim for general average, and *H. T. de Sampayo* was decreed by the Court, conformably to such general laws and practice to pay, and was thereby compelled and did pay to the master or owner of the ship, 6*l.* 12*s.* 10*d.* per cent. on the value of the goods insured by the policy, as a general average or contribution in the nature thereof; the said sum of 6*l.* 12*s.* 10*d.* per cent. including contribution to the expence of the wages and provisions at *Cowes*, as well as to the several other damages, losses, and expences

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before

before mentioned. And for the recovery of this sum of 6*l.* 12*s.* 10*d.* per cent. this action was brought.

If the Court should be of opinion that the proceedings, and decree of the Court at *Lisbon*, are of themselves sufficient to entitle the Plaintiffs to recover the same rate of average which the assured was thereby compelled to pay, the verdict to stand: if they should think otherwise, but should be of opinion that the sum of 422*l.* 6*s.* 8*d.*, (the amount of the two items of expenditure for wages and provisions at *Cowes*) or any part thereof, does properly form an item to which the defendant, as an underwriter on the cargo, is liable to contribute as for a general average, or otherwise, the verdict to be entered, according to the award of an arbitrator who is to ascertain the sum. If the Court should be of opinion that the Plaintiffs are not entitled to recover any thing in respect of the wages and provisions at *Cowes*, a nonsuit to be entered.

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Abbott argued for the Plaintiffs in the last term (a), 1st, that independently of the decree of the Court at *Lisbon*, the defendant was liable to contribute, if not to the whole extent, at least to so much of the expenditure for wages and provisions, as was incurred between the time of the ship's first putting into *Cowes*, and her first quitting it. For her putting in the first time is stated to have been necessary for the safety of the ship and cargo, and it was for the repairing the damage occasioned by tempest, in order to prosecute and complete the voyage. And where that is the object, it appears from some of the writers upon this subject that

(a) *Dampier J.* was absent when the case was argued.

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the wages and maintenance of the crew during the delay thus necessarily occasioned, are to be sustained by general contribution. And he cited *Bearwes Lex Merc.* (a) to that effect, and *Da Costa v. Newnham* (b), to shew that the passage from *Bearwes* was quoted seemingly with the approbation of the Court, but he admitted that the decision itself was not immediately upon this point, and that the law books did not furnish any decision upon it. He also admitted that in respect of that part of the damage done to the ship, in her passage from *Cowes* to *Lisbon*, by standing out to sea and carrying a press of sail, in order to avoid the impending peril, the case so much resembled *Covington v. Roberts* (c), that he could not ask for contribution. But 2dly, he contended that the decree of the Court at *Lisbon* was of itself conclusive in favour of the plaintiffs' right to recover the like rate of average which by that decree the assured was obliged to pay. For this was a court of competent jurisdiction over the subject matter, and over the parties to the suit, and all resistance to its decree would have been ineffectual; which is the reason why judgments in the prize court are holden to be binding. And this being an insurance to a foreign country, the underwriter is bound by the law of the country to which the contract relates, that is, to indemnify the assured, if he is obliged by the law of that country to contribute to a general average. Upon which principle it seems *Walpole v. Ewer* (d) was ruled by Lord *Kenyon*, and *Newman v. Cazalet* (e) by *Buller J.* though in the latter the judge relied much upon an usage.

(a) 166.

(b) 2 T. R. 413.

(c) 2 N. R. 378.

(d) *Park's Insur.* 565.(e) *Ibid.* 566.

Carr, *contra*, was directed by the Court to confine himself to the last point, and he argued that this was not like the sentence of a prize court. For a prize court professes to proceed upon the law of nations, and when it does so, its sentence is conclusive, because the law of nations is an universal law; yet the sentence even of a prize court is not conclusive, whenever it appears that it has not proceeded according to that law, as if the sentence be founded on partial ordinances (*a*). And if the sentence of a court of general jurisdiction be not conclusive, unless it conform to the general law, how shall the sentence of a court of peculiar jurisdiction, such as this court at *Lisbon*, which professes to conform to the general maritime laws and practice of *Lisbon* only, be conclusive, especially against this defendant, who neither had notice, nor was a party to the suit? Granting that the Court had jurisdiction over the matter and over the parties to the suit, that is, the owners of the ship and goods, yet if the underwriter is to be bound by the consequences of the law of every foreign port to which he shall make insurance, it will follow, that there must be as many rules of general average as there are foreign ports to which insurance may be made. Therefore, to prevent any thing so inconvenient and uncertain, the rule is settled, that the insurer shall not be bound to take notice of the municipal laws of other countries, but shall be taken to contract with reference to those of his own country only, unless it is shewn that the parties meant to extend the contract farther. This is fully illustrated by what took place in *Simcon v. Bazett*, for upon the first trial it was held, conformably

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(*a*) *Bird v. Appleton*, 8 T. R. 562.

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to this rule, that the insurer in this country was not answerable upon his contract for a loss occasioned by the act of the foreign state to which the ship was bound; but upon a suggestion that the contract was made with a view to such risk, the case went down again, and was finally determined upon the intention, which was held to qualify the rule (a). In this case however it is not shewn that the parties had it in contemplation to treat any losses or expences as general average which are not such by the law and usage of *England* where the contract was made. *Walpole v. Emer* is but a *nisi prius* decision, and *Newman v. Cazalet* is the other way; for *Buller J.* relied upon the usage, which was proved, and said that, but for the usage, the plaintiff would have failed on the general law. Another objection to the plaintiffs' right to recover is this, that this is a loss occasioned by the law of the assured's own country, and so within the principle of *Conway v. Gray* (b), *Mennett v. Bonham* (c), and *Flindt v. Scott* (d); which principle was not overruled in the Exchequer-chamber (e), though it was held not to apply where the assured was trading under a licence.

Abbott in reply to the last objection remarked, that the acts by which the loss was occasioned in the cases cited, were acts of state, such as embargo, or confiscation founded upon ordinances of the state, and not, as here, a judgment in a court of competent jurisdiction proceeding according to the general maritime laws.

(a) *Ante*, vol. ii. 94. 5 *Taunt.* 824.(b) 10 *East*, 536.(c) 15 *East*, 477.(d) *Ib.* 525.(e) 5 *Taunt.* 674.

Lord

Lord ELLENBOROUGH C. J. upon the first point said, that the language of *Beaves* in the passage cited was very loose, and that the same doctrine he believed was not to be found in other writers of equal authority. And he said, that general average must lay its foundation in a sacrifice of part for the sake of the rest, but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather. That this was not like the case recently before the Court (*a*), where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed. And still less was the damage incurred, while standing out to sea, an object of contribution. Upon the other point he said, as it was of very general and extensive consequence, the Court would take farther time.

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Cur. adv. vult.

Lord ELLENBOROUGH C. J. on this day delivered the judgment of the Court. After stating the case, his lordship said, that upon the argument of the case the Court intimated a clear opinion, that the several items of loss with which the Defendant as an underwriter was sought to be charged in this action, were none of them the subject of general average by the law of *England*. This contract must be governed in point of construction by the law of *England*, where it was framed, couched as it is in the terms of an instrument, in general and familiar use, and of known meaning in *England*, unless the parties are to be understood as having contracted on the foot of some other known

(*a*) *Plummer v. Wildman*, ante, vol. iii. 482.

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general usage amongst merchants relative to the same subject, and shewn to have obtained in the country where by the terms of the contract the adventure is made to determine, and where a general average (if such should under the events of the voyage be claimed) would of course come to be demandable. Now, without pronouncing what might have been the effect of a statement in this case, (if it had contained such,) that it was the known and invariable usage amongst merchants at *Lisbon*, the port of discharge, to treat losses and expences of the kind and description which are specified in the case, as the subjects of general average, we cannot but observe that the case contains no allegation of fact whatsoever on this head, but merely states a decree of a court at *Lisbon* which proceeds upon the assumption of this supposed fact as its foundation. And although by the comity which is paid by us to the judgment of other courts abroad of competent jurisdiction we give a full and binding effect to such judgments, as far as they profess to bind the persons and property immediately before them in judgment, and to which their adjudications properly relate, yet we feel that we should carry that principle of comity further than reasonably ought to be done, or ever hitherto has in practice been done, if we should draw from the recitals of facts and usages which are contained in those judgments, general evidence of the existence of such facts and usages, and allow them to be available for all causes, and purposes, and consider them as applicable to, and obligatory upon other persons than the immediate parties to those judgments, in which these recitals occur. Here the underwriters have a right to insist, as this Defendant does insist, that
the

the general average to which alone their indemnity is confined, is general average as it is understood in *England* where this contract of indemnity was formed; no other distinct and different sense and use of that term being proved in evidence to obtain in point of fact, and to be generally adopted by usage in the country where the contract was to determine, viz. *Lisbon*; the general laws and practice supposed to authorize this demand of general average being only recited in the terms of another judgment against the assured, and not alleged or proved as a fact in this present case, and which recital in the judgment we are of opinion is not a competent medium of proof for this purpose. The consequence is that there must be judgment of nonsuit in this case.

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Friday,
May 5thCox and Others, Assignees of SWAN and ANDERSON, Bankrupts, *against* MAY and Others.

Where a ship was chartered upon a voyage out and home, at 2*l.* 10*s.* per ton, register measurement, per month, 2500*l.* to be paid on clearing outwards, the like sum at the end of twelve months, and the remainder three months after being reported at the custom-house on her return; and the ship delivered her outward cargo, and sailed with her homeward cargo, and was captured and recaptured on the homeward voyage, and the ship and cargo were sold by consent of all parties, the owner and charterers having respectively made claim in the Admiralty Court to ship and goods, where restitution was decreed to them upon payment of salvage: Held that the charterers (having paid the two sums of 2500*l.*) were not liable to contribute to the ship-owner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight, but that the ship-owner in respect of the freight was liable to the whole salvage; and the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the ship-owner as far as his liability was concerned; held that they might set it off in an action of covenant by the owner for the residue of the freight.

Secus as to the charges of establishing the claim to the cargo, and procuring the decree for its restitution, for held that the charterers alone were liable to them.

COVENANT on a charter-party by the plaintiffs as assignees of *Swan* and *Anderson* for 16,145*l.* 13*s.* 7*d.* for freight of the ship *Ramoncita*. Plea, as to 13,864*l.* 8*s.* 9*d.* payment, and as to 2281*l.* 4*s.* 10*d.*, the residue, a set-off for so much paid by the defendants, as proprietors of the cargo, for the plaintiffs' contribution, as owners of the ship, in respect of the freight, for salvage and charges, by reason of recapture of ship and cargo, which had been captured on the voyage. Issue thereon.

At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Trinity* term 1814 there was a verdict for the plaintiffs for the said sum of 2281*l.* 4*s.* 10*d.* subject to the opinion of the Court upon a case, of which the material facts were these:

By charter-party of affreightment between the bankrupts, before their bankruptcy, and the defendants, the ship was let to the defendants on a voyage from *London* to *Lima* and back, to be laden with whatever goods the freighters might think proper; and it was covenanted that it should remain in the service of the freighters 12

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calendar months at least, and for such farther time as should be necessary to complete the voyage; and the defendants covenanted to pay freight for the same at the rate of 2*l.* 10*s.* per ton, register measurement, per calendar month, 2500*l.* part thereof, on the day the ship should be cleared outwards, 2500*l.* further part, at 12 months from the same period, and the remainder three months after the ship should be reported at the custom-house in *London* from her said voyage. The ship sailed and delivered her cargo at *Lima* under the direction of the defendants, and took in a homeward cargo laden by the defendants, and under their direction sailed to and delivered a part at *Cadiz*, and proceeded with the rest for *London*, but in her voyage thither was captured and recaptured, and carried into *Cork*, and was proceeded against by the recaptors for salvage in the Admiralty Court. The ship and cargo being claimed respectively by the plaintiffs and defendants, the ship by order of the Court prosecuted her voyage to *London*, and arrived in *London*, and was reported at the custom-house. Restitution of the ship and cargo was decreed upon payment of salvage to the recaptors, and security for payment of it was given by the defendants, with the assent of the plaintiffs, as far as their interest in the subject-matter, and their liability for payment of the salvage were concerned; and the ship and cargo, with the consent of the parties interested and of the recaptors, were sold, the cargo for 14,351*l.* 18*s.* 2*d.*, the ship for 5491*l.* 13*s.* 9*d.* The salvage on the recapture, being one-eighth of the net proceeds contributory to salvage, amounted to 2312*l.* 0*s.* 6*d.*, and the charges of establishing the claim to ship and cargo, and of procuring the

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the decrec of restitution, to 1347*l.* 7*s.* 7*d.* Of these two sums the plaintiffs paid so much as was their due proportion of the salvage and charges in respect of the value of the ship, and the residue, viz. 2281*l.* 4*s.* 10*d.* was paid out of the proceeds of the defendants' cargo; which the defendants claimed to set off, having already paid to the bankrupts, before the bankruptcy, the two sums of 2500*l.* at the times stipulated by the charter-party, and to the plaintiffs the sum of 13,864*l.* 8*s.* 9*d.* in part of the 16,145*l.* 13*s.* 7*d.* now claimed by them as due for the remainder of the freight.

And the questions for the opinion of the Court were, 1st, Whether under the circumstances the defendants are liable to pay any and what contribution to the two sums for salvage and charges in respect of their goods on board the ship at the time of her capture and recapture, they being of a value not sufficient to satisfy the freight remaining due upon the whole voyage out and home. 2dly, Whether the plaintiffs in respect of the sum of 16,145*l.* 13*s.* 7*d.* or any, and what part of it, remaining due at the termination of the voyage, or in respect of the freight payable at the time of her capture and recapture, are, in addition to what they have contributed, liable to contribute to the two sums for salvage and charges. A verdict for the plaintiffs or a nonsuit to be entered according to the rule which the Court should pronounce.

This case was twice argued; once in last *Hilary* term (a) by *Spankie* for the plaintiffs, and *Marryat* for

(a) *Dampier J.* was absent upon the first argument.

the defendants, and again in this term by *Campbell* for the plaintiffs and *Park* for the defendants. For the plaintiffs the argument was in substance this, 1st, the defendants in respect of their goods are liable to the whole amount of the 2281*l.* 4*s.* 10*d.* paid by them; for the stat. 43 G.3. c. 160. s. 39. makes the ship and goods respectively to be restored, liable to the payment of salvage: and the defendants in respect of their goods are also liable to a proportion of the charges; because the charges were incurred for the common benefit, and the defendants put in their claim to the goods. And as to the value of the goods being insufficient to cover the demand for freight, whether the defendants will derive more or less benefit by the re-capture, cannot affect their liability to contribute to salvage, for as well might it be said, in the case of jettison, that a party whose goods are saved, shall not be liable to contribute to general average, because it will absorb his profits. And if it were material, here the defendants have derived advantage from the re-capture to the extent of 14,351*l.* 18*s.* 2*d.*, the value of the cargo; for suppose the ship had arrived without the cargo, the defendants would have been bound to pay precisely the same freight as now that the cargo has arrived, for it was payable by the charter-party three months after the ship should be reported; it is plain, therefore, that the re-capture has enabled them to liquidate the freight pro tanto, and that instead of being losers to the whole amount of the freight, they have lost only the difference between the value of the goods and the amount of the freight. Besides, though these goods were not sufficient to reimburse the defendants for the freight,

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freight, non constat that upon the whole adventure out and home, they were not gainers. 2dly, The plaintiffs are not liable to contribute in respect of the 16,145*l.* 13*s.* 7*d.*, or any part of it. For allowing that the ship-owner would in general be liable to contribute in respect of the ship and the clear amount of the freight, yet this is not freight, but is, according to Lord *Hardwicke* (a), rather the hire of the ship; it is a specific sum contracted to be paid upon the ship's arrival, for the time she has been employed, without relation to the quantity of the goods, for which the plaintiffs have no lien upon the goods, it being a mere chose in action; whereas freight is incorporated with the goods, and therefore the owner has always a lien for it upon the goods. And it seems that wherever he has not, he cannot be called upon to contribute as for freight; which is the reason why dead freight is not contributory, and why the lenders upon bottomry (b), or respondentia (c), are not liable to contribute; yet they are interested in the arrival of the ship and goods.

For the defendants it was contended, that the salvage was payable by those, and those only who were benefited by the recapture; that in this case the whole of the defendants' cargo being absorbed, and as totally lost to them, as if the re-capture had never been made, the plaintiffs alone were benefited, not only by the restitution of their ship, but by the receipt of 13,864*l.* 8*s.* 9*d.* for freight, which but for the re-capture they would have wholly lost. The rule in this country for contribution to salvage, as

(a) *Paul v. Birch*, 2 *Atk.* 621.

(b) *Joyce v. Williamson*, *Park. Insur.*

(c) *Walpole v. Ewer*, *ib.*

well as average, to which it is like, is this, that the ship-owner contributes according to the value of the ship at the end of the voyage, and the clear amount of the freight or earnings of the voyage; and the owner of goods contributes after deducting the freight and charges (a). Each contributes according to the benefit he derives, and therefore if one derive the whole benefit, he shall contribute the whole. And as to this being a chartered ship, the cases of *Williams v. The London Assurance* (b), *The Racehorse* (c), and *The Progress* (d), shew that freight due under a charter-party is equally liable to contribute.

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Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was an action of covenant for freight upon a charter-party. The ship was chartered to *Lima* and back, at 2*l.* 10*s.* per ton, register measurement, per calendar month, of which freight 2500*l.* was to be paid on her clearing outwards, 2500*l.* at the end of 12 calendar months, and the remainder, three months after her being reported at the custom-house in *London* on her return from her said voyage. The ship sailed with a cargo for *Lima*, and delivered it there under the direction of the defendants, where she took on board a homeward cargo laden entirely by the defendants, of which she delivered part at *Cadiz*, and proceeded with the rest for *London*. The two sums of 2500*l.* stipulated by the charter-party to be paid at the

(a) *Molloy*, b. 2. c. 6. s. 16.(b) *Ante*, vol. i. 318.(c) 3 *Rob. Adm. Cas.* 191.(d) 1 *Edw. Adm. Cas.* 224.

times

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times above mentioned were duly paid, and the remainder of the freight, which was to be paid at three months after she had been reported at the custom-house in *London* (for which the action was brought) came to 16,145*l.* 13*s.* 7*d.* In the course of the homeward voyage the ship was captured and recaptured, and the cargo was sold by the consent of the parties interested, and of the salvors, for 14,351*l.* 18*s.* 2*d.*, and the ship for 5491*l.* 13*s.* 9*d.* The salvage on the recapture was 2312*l.* 0*s.* 6*d.* and the expences of establishing the claim to ship and cargo, and of procuring a decree of restitution upon salvage, amounted to 1347*l.* 7*s.* 7*d.* Of these sums the ship has borne the proportion which, in respect of its value of 5491*l.* 13*s.* 9*d.*, it ought to bear in that salvage and those expences; and the defendants contend that the residue, which is 2281*l.* 4*s.* 10*d.* ought to be borne by the freight which is payable to the plaintiffs; and in as much as they the defendants have already paid that sum by their brokers out of the proceeds of the cargo, they have pleaded a set-off in respect of that sum as for money paid to the plaintiffs' use. The questions therefore for the consideration of the Court are, 1st, Whether the defendants, in respect of their goods, are liable to any and what contribution towards these sums of 2312*l.* 0*s.* 6*d.* the salvage money, and 1347*l.* 7*s.* 7*d.* the charges of obtaining restitution: and, 2dly, whether the plaintiffs, in respect of their freight, are liable to any and what contribution to the salvage and charges above mentioned. And, as to the first question, we are of opinion that the defendants are not liable to any contribution towards the sum of 2312*l.* 0*s.* 6*d.* the salvage, in respect of their goods, but

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but that charge must be borne wholly by the plaintiffs, the owners of the ship, and persons entitled to freight: and, 2dly, on the other hand, that the plaintiffs are not liable, farther than they have already contributed, towards the sum of 1347*l.* 7*s.* 7*d.*, the charges of establishing the claim to ship and cargo, and of procuring a decree of restitution. That freight is liable, in some cases at least, upon a chartered ship, to contribute to salvage, was adjudged without difficulty, and almost without resistance, in the case of the *Racehorse*, 3 *Rob.* 101.; and that it is liable to contribute to general average, which in this respect is analogous to the case of salvage, was decided by this Court in *Williams v. London Assurance Company*, 1 *M. & S.* 318. The principle upon which freight is to contribute in the case of general average is, that it was one of the things in hazard at the time when that sacrifice which produced the general average was made, and the principle upon which it contributes in the case of salvage is, that but for the recapture, for which the salvage is paid, it would have been lost. Salvage is a compensation to the salvors, not merely for the restitution of the property which has been made by them to the prior owners, (for that is properly an act of mere justice on their part,) but for the risque and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved, and the persons to contribute to that salvage are the persons who would have borne the loss had there been no such rescue, and who of course reap the benefit of that rescue. To form a judgment who would have borne the loss, had

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had there been no rescue, and to whom the rescue was beneficial, we must look to the interest which each party had. The plaintiffs had an interest in the hull of the ship, as ship owners, to the extent of the value of the ship, and they had also an interest in the arrival of the ship at *London* to the extent of the freight, which would become due to them in that event, which was 16,145*l.* 13*s.* 7*d.*, and the defendants were interested in the goods to the amount 14,351*l.* 18*s.* 2*d.*; but as the ship's arrival would subject them to the payment of the 16,145*l.* 13*s.* 7*d.*, the loss by the capture would have been on the whole a beneficial event to them, and they of course derived no advantage, but on the contrary receive a prejudice by the event of the rescue. The salvage therefore, though computed upon ship and cargo, ought to be borne wholly by ship and freight, which is to be received by the ship owners, and the cargo ought to contribute nothing. It is very true that by this means the freight is made to bear that salvage, which was paid to the recaptors in respect of the cargo saved, and the ship owner has a much higher salvage to pay than would have been the case had the ship returned in ballast; but as it was in the contemplation of all parties that the ship was to come home loaded, the ship owners have no right to complain of any consequence which results from what was so contemplated; and if the plaintiffs are alone benefited by the re-capture, they must bear the whole amount of the salvage, whatever that may be. They must therefore bear the whole of the sum 2312*l.* 0*s.* 6*d.* With regard to the other sum of 1347*l.* 7*s.* 7*d.*, that stands upon a perfectly different footing. That was
 paid

paid in order to obtain restitution, and though the plaintiffs were interested for themselves in obtaining restitution of the ship, it was wholly indifferent to them whether restitution was ever made of the cargo. Their freight would have been, under the terms of this charter-party, by which it is payable per ton per month, the same whether the cargo had been restored or not. So as the ship arrived and was reported at the custom-house in *London* their freight would become due. The defendants therefore alone were the persons interested in obtaining restitution of the cargo. If they had not obtained it, still on the ship's arrival they would have become liable to pay the stipulated rate of freight. As the restitution of the cargo therefore was for their benefit alone, and afforded them a fund pro tanto wherewith to pay the stipulated freight, they alone must bear the expence of obtaining the restitution. That proportion therefore of the 1347*l.* 7*s.* 7*d.* which is referable to the cargo, and which is agreed to be adjusted out of court, must be borne by them, and for that sum, when ascertained, a verdict must be entered for the plaintiffs.

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1815.

Saturday,
May 6th.The KING *against* TOWER.

Where a copyhold tenant was forbid by the lord to cut underwood upon the copyhold without the lord's licence, the Court granted a mandamus to the lord to permit him to inspect the court-rolls so far as related to the cutting of underwood, after application to and refusal by the lord, although there was not any suit depending.

THE Earl of *St. Vincent*, being seised in right of his wife, according to the custom of the manor of *Southweald* in *Essex*, of certain acres of woodland, holden of the manor by copy of court-roll, of which manor the defendant was lord, gave directions to fell the underwood and bushes thereon, but no sooner had the persons employed by him to fell the same begun the work, than they were prevented by the defendant, who forbid their doing it, insisting that it was necessary to apply to him first for a licence. And the earl being desirous of inspecting the court-rolls in order to discover if there existed any custom within the manor authorizing the lord's claim, applied to him for leave to inspect, but was refused. Whereupon he moved the Court for a mandamus to the defendant to permit him to inspect the court-rolls of the manor, so far as related to the cutting of underwood within the manor, and to take copies of them.

Marryat, who shewed cause, resisted the rule, upon the ground that this was not a matter which concerned the title to the estate, nor was there any suit depending. And he cited *Rex v. Allgood*. (a)

But per Lord ELLENBOROUGH C. J. The copyhold tenant claims a right to the underwood, against which the lord sets up a counter-right, and the lord has the

(a) 7 T.R. 746.

custody of the muniments which contain the evidence of the manorial rights. And shall he, who is a trustee and guardian of the evidence of the tenants' rights, lock it up from them, and in a matter too where his own interest is in question? I do not see upon what principle of justice that is to be done. Nor does the Court require, before it interposes by mandamus, that there must be a suit depending; it would be extremely hard if it did, for then the tenant would be obliged to commence an action blindfold, with an uncertainty of what his rights might be. The claim of the tenant is only to inspect quoad the particular object, and that seems to me to be clear. Therefore this mandamus ought to go.

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LE BLANC J. The mandamus is not to inspect the court-rolls generally, but only as far as respects the cutting of underwood.

BAYLEY J. referred to *Rex v. Lucas (a)*, where a mandamus to inspect court-rolls was granted, yet there was not any suit depending at the time.

Per Curiam,

Rule absolute.

Holroyd was in support of the rule.

(a) 10 East, 235.

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Saturday,
May 6th.

The KING against MARSDEN.

In an indictment for a libel against *W. S.*, omitting to allege that the defendant published it "of and concerning *W. S.*," held that such omission was not supplied by its being alleged in the introductory part, "that the defendant intended to vilify *W. S.*, he having been mayor of, &c., and to cause it to be believed that as such mayor he had practised corruption, and been guilty of abuse, in respect to granting a licence to one *J. L.* to retail beer," &c., and concluding "to the injury and disgrace of *W. S.*" &c.; although the innuendos pointed the different parts of the libel to *W. S.*, and to *J. L.*, and to the granting the licence.

THE defendant was convicted at the last *Essex* assizes upon an indictment for a libel, to which he pleaded not guilty. The indictment charged, that the defendant being an evil-disposed person, and unlawfully and maliciously devising and intending to defame and vilify the character and reputation of *W. S.*, he the said *W. S.* having been a little before the time of committing the offence mayor of *Colchester*, and being then and at the time of committing the offence a justice of the peace for the borough, and to cause it to be believed that *W. S.* as such mayor had practised gross corruption, and been guilty of great abuse in the exercise of his several offices of mayor and justice, in relation to granting a licence to one *J. L.* to retail ale or beer at a public house known by the sign of the *Blue Posts* within the borough, and that *W. S.* had been guilty of perjury, and to bring him into great scandal, infamy, and disgrace, unlawfully and maliciously printed and published, and caused and procured to be printed and published, a certain scandalous and defamatory libel, intitled, &c. It then set forth several parts of the libel, stating it to be in the form of a speech supposed to have been made at some borough sessions, or meeting of borough magistrates, by a fictitious character called *Excise*, who is supposed to lay before them a case of gross corruption sanctioned by the mace, (innuendo the said *W. S.* as such mayor as aforesaid,) accusing *Sloe-juice*, (innuendo the said *W. S.*) a vender of gin, of offering to *Lawless*, (innuendo the said *J. L.*) a licence (innuendo a licence for

for the said *J. L.* to retail ale or beer) upon condition that he took his liquors of him, and of receiving an order for the liquors ere he granted the sign (innuendo a licence to sell ale or beer) as aforesaid, which sign was the *Blue Posts*, &c. And so it concluded, To the great scandal, injury, and disgrace of him the said *W. S.*, in contempt of our Lord the King, &c. and contra pacem. And in the introductory part of the second count it charged, that the defendant intending to defame *W. S.*, being then a justice, &c. and a dealer in wine and spirits, and to cause it to be believed that *W. S.* had been guilty of corruption as such justice, and had granted a licence for the retailing of ale and beer to the keeper of the inn called the *Blue Posts*, in consideration of the keeper of such house having given to *W. S.* in the way of his trade, as such dealer in wine and spirits, an order for certain gin and wine, and to bring him into disgrace, &c.; and so it proceeded and concluded as in the first count, setting out a smaller portion of the libel.

And it was moved on a former day by *Best Serjt.*, in arrest of judgment, that the indictment did not allege that the defendant published the libel "*of and concerning W. S.*;" and though the indictment sets forth the libel with innuendos applying it to *W. S.*, yet that will not supply the want of this introductory averment, that he published it "*of and concerning.*" And for this cause judgment was arrested in *Rex v. Alderton (a)*, yet in that case as well as in this the information contained innuendos, and also alleged in the inducement that the defendant intended to asperse the justices. And as the

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(a) *Sayer*, 280. S. C. cited by *De Grey C. J. Goup.* 686.

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publication alone without the unlawful intention would not be criminal, it is reasonable to require that the indictment should plainly connect the intention with the publication; for the innuendos will not do it, the office of an innuendo not being to connect the several parts of an indictment, but only to designate a person who has been named in certain before, and in effect it stands in place of "prædictus," but cannot make a person certain who was uncertain before (a). Nor is it sufficient to say that it is apparent by the tenor that the libel concerns *W. S.*, for in *Johnson v. Aylmer* (b) the words spoken appeared clearly to have been spoken of the plaintiff, for he was named by his name, *Jeremy Johnson*, yet because they were not alleged to be spoken of him, but only by innuendo, judgment was arrested. So in *Lowfield v. Bancroft* (c) judgment was arrested for the very cause now alleged.

Marryat and *Knox* shewed cause, and admitting that a deviation from established forms was not to be encouraged, yet they said this being a technical objection, if the Court, notwithstanding the omission of the words "of and concerning," could see from the whole record that the publication was necessarily a publication of and concerning *W. S.*, they would be inclined to give it effect. For these words are not in themselves so essential that nothing can dispense with them, as appears from the old entries, where "*versus eundem*" is sometimes used instead of "*de et concernen*." Now taking the prefatory part and the conclusion of this indictment together, it is alleged that the defendant intend-

(a) 4 Rep. 17. b.

(b) Cro. Jac. 126.

(c) Str. 934.

ing to *defame* W. S. printed and published the libel to the *disgrace and injury* of W. S.; or if the allegation which charges the defendant with publishing be transposed so as to make it precede the words "to cause it to be believed that W. S. as such mayor had practised corruption," &c. then an allegation will not be wanting, that the publication was aimed against W. S.; and the innuendos will explain the words which point to W. S. who has before been named, individually, or in his office of mayor, or as granting a licence, all of which have been mentioned before. That an indictment may be construed according to the sense which the whole will bear, without regard to the particular position of its parts, appears from *Rex v. Philipps* (a), where the indictment was sustained by reference to the introductory part; and although an innuendo shall not supply any thing, as in slander for speaking these words, "he burnt my barn," innuendo "my barn full of corn," the innuendo shall not help the matter (b), yet the nature of an innuendo is to explain doubtful words where there is matter sufficient in the indictment to maintain it. And here it is used to explain words, by way of reference only, and in the nature of *præfatus*. But admitting that for want of these words *of and concerning*, the indictment does not sufficiently designate W. S. to be the person against whom the libel was directed, yet it is well enough without it, because if a man intending to vilify W. S. publish a libel to the injury of W. S. he is indictable for it, though he do not publish it of W. S. but of some other person; and therefore to publish a libel on the memory of the dead, with intent to injure

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(a) 6 East, 472.

(b) Telv. 21.

and

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and to the injury of the living, is indictable (a). And as to *Johnson v. Aylmer* and *Lowfield v. Bancroft*, they were actions for a civil injury, and it does not appear the counts contained any introductory matter to help the want of its being alleged that the words were spoken of the plaintiff.

LORD ELLENBOROUGH C. J. If by inevitable construction it appeared that no other person could be intended but *W. S.*, I should have been inclined to sustain this indictment, but I cannot say that it does so appear. And undoubtedly it is advisable in most cases, and especially in indictments, to adhere to old forms, even if it were only for the sake of uniformity of proceeding. In this instance I dare say the omission has been through a mistake, and if I could find any words of equivalent import I should be unwilling to arrest the judgment. But the words "of and concerning" are very material words, the importance of which has been pronounced by a court of the highest resort (b). There may perhaps be words of equivalent import, but I should not advise them, I should say rather that the *via trita* is the safest. We find in the instance of a civil action that judgment was arrested for want of them, and I cannot see any material difference in this respect between an action and an indictment; in both it is required that there be certainty, and if there is any difference it surely cannot be in favour of a less degree of certainty in an indictment than in an action. And here *Rex v. Alderton* is a strong authority, not indeed as it is reported in *Sayer*, but as it appears

(a) *Rex v. Topham*, 4 T. R. 126. *Rex v. Critchley*, *ib.* 129.

(b) See *Rex v. Horne*, *Cowp.* 682.

upon referring to the information; for the information contained a prefatory allegation that the defendant intended to asperse the justices of *Suffolk*, and to represent them as unfit to dispose of the money intrusted to them by law, &c. and then it charged that he did *for that purpose* write and publish the libel; so that it seems to have contained every thing except the very words “*of and concerning.*” Now this indictment has neither the words themselves, nor any words of the like import; and in the absence of any such, or any allegation that *W. S.* was either a seller of sloe-juice, or that sloe-juice is a supposed ingredient in wines or gin, what is there to connect *W. S.* with that name? I cannot find any words which necessarily fix this to be a libel on *W. S.* to the exclusion of all others.

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LE BLANC J. Lord C. J. *De Grey*, who cites *Rex v. Alderton*, was of counsel in it with Serjt. *Prime*, and settled the information. According to a note of that case, the Chief Justice (*a*), after the argument, desired to have a copy of the information before the Court gave judgment.

BAYLEY J. The office of an innuendo is merely explanatory; therefore the indictment ought by previous matter to shew something to connect the party libelled with the libellous matter, as by the words “*of and concerning.*” Here I find nothing to connect *W. S.* with the name of *Sloe-juice*, his being a vintner does not necessarily do so, and it is not alleged that vintners are supposed to have or use sloe-juice. The exception is a very strict one, but still it is consonant

(a) *Ryder C. J.*

with

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with the authorities. If the indictment had contained clear words of reference, or words of equivalent import, I should have been inclined to uphold it.

DAMPIER J. The report of *Rex. v. Alderton* in Sayer is likely enough to mislead the reader, but as it is stated by *De Grey* C. J., who had been of counsel in it, in *Rex v. Horne* (a) it appears that the information having omitted the words "of and concerning the justices," in the introductory part, the omission was held fatal. And the reasoning of the learned judge from that case was, that the words "of and concerning" are a sufficient introduction of new matter. Supposing the allegations in this indictment could be transposed as mentioned, still it would be met by the authority of *Rex v. Alderton*, because there it was alleged "that he did *for that purpose* publish the libel," yet it was held insufficient.

Rule absolute. (b)

Best Serjt. and *Gurney* were to have argued for the rule.

(a) *Cowp.* 686.

(b) See *Hawkes v. Hawkey*, 8 *East*, 427.

1815.

HARRIS *against* LLOYD.

Monday,
May 8th.

LITTLEDALE shewed cause against a rule for entering a suggestion that the plaintiff recovered less than 40s. &c. under stat. 23 G. 2. c. 33. s. 19. in order to entitle the Defendant to double costs. He objected that the act applied only to cases where there has been a trial, and not to the case of judgment by default and writ of inquiry; which was the present case.

A suggestion cannot be entered under stat. 23 G. 2. c. 33. in order to entitle the defendant to double costs, after judgment by default and writ of inquiry, but only where there has been a trial.

And *The Court* agreeing to that, the

Rule was discharged.

Espinasse was for the rule.

END OF EASTER TERM.

C A S E S

1815.

ARGUED AND DETERMINED

IN THE

Court of KING's BENCH,

IN

Trinity Term,

In the Fifty-fifth Year of the Reign of GEORGE III.

BEARDMORE and Others *against* PHILLIPS.

Friday,
May 26th.

ONE of the bail in this cause, who was a house-keeper, was admitted to justify in respect of property consisting partly of cash and partly of a freehold house at *Gibraltar*.

Bail allowed to justify in respect of property, consisting partly of cash and partly of a freehold house at *Gibraltar*.

This was allowed by DAMPIER J. (the only judge in court) upon the authority of *Christie v. Filleul*. (a)

(a) 2 Bl. R. 1323.

1815.

Tuesday,
May 30th.EYLES *against* WARREN.

In order to obtain leave to enter up judgment on an old warrant of attorney, it must be sworn, that the defendant was alive on a day in full term; the essoign day is not sufficient.

GASELEE moved to enter up judgment on an old warrant of attorney, upon an affidavit that the defendant was alive on the essoign day of the term. He admitted that the practice used to be to require an affidavit that the party was alive on some day in full term, but he vouched a case in the last term where this motion had been granted upon a similar affidavit to the present, upon the authority of a case referred to in a note to *Tidd's Pract.* 4th edit. 490., that on the essoign day was sufficient.

G. Marriott (amic. cur.) acknowledged having obtained the rule mentioned; but said that he had since discovered that the case referred to in the note to *Tidd's Pract.* 4th edit., did not make good the conclusion drawn from it, and that the note was altogether omitted in the 5th edit. And so leave was refused in this case, (*Le Blanc J.* being the only judge in Court,) but he afterwards mentioned the case when the Court was full, and then said, it was proper that the rule should be understood as applying universally for the governing the practice of the Court in future. That as all judgments in actions by bill relate to the first day in full term, the Court were of opinion that the defendant must be sworn to be alive either on the first or upon some day in full term.

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**COTTLE against ELIZABETH ALDRICH, Executrix
of C. ALDRICH, deceased.**

*Tuesday,
May 30th.*

ASSUMPSIT for work and labour done for the testator, and on the money counts. Pleas, non assumpsit, and ne unques executrix. At the trial before *Le Blanc J.* at the *London* sittings after last term the case was thus: *C. Aldrich* the testator was a tradesman in *London*, and died having appointed *J. Aldrich*, *J. Taylor*, and *J. Denton* his executors, of whom *J. Aldrich* alone proved the will, but a power was reserved to the others to come in. *J. Aldrich* being resident at a distance from *London* granted a power of attorney to *Denton* and the Defendant (who was the sister of himself and the deceased) to act for him; and she continued the business, and acted in the administration of the deceased's effects, under this power, for some time, and until the death of *J. Aldrich*. *J. Aldrich* died leaving the defendant and two others his executors, who proved the will, and the defendant still continued, after *J. Aldrich's* death, to act in the administration of *C. Aldrich* (the first testator's) effects, consulting with and acting under the advice of *Denton*. It appeared, however, that she proved, under a commission of bankruptcy, a debt due to the estate of *C. Aldrich*, making her claim as executrix of *J. Aldrich*, who was executor of *C. Aldrich*. And upon this case it was objected for the defendant that she was not chargeable as executrix of *C. A.*, she having during the life of *J. A.*, who was executor of *C. A.*, acted under a power of attorney from him, and after his decease, with the assent and as agent of *Denton*

Although a person cannot be charged as executor de son tort while he acts under a power of attorney, made to him by one of several executors who has proved the will, yet if he continue to act after the death of such executor, he may be charged as executor de son tort, though he act under the advice of another of the executors who has not proved.

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—
COTTLE
against
ALDRICH.

another executor of *C. A.* The jury were directed to consider upon the evidence, whether after the death of *J. A.* the defendant voluntarily interfered as executor of *C. A.* without authority, or acted merely as an agent. And the jury found a verdict for the plaintiff.

And now *Park* moved for a new trial, for, first, he said, the law did not transmit the executorship of *C. A.* to the defendant, by reason that she was executrix of *J. A.* who was executor to *C. A.*, because *Taylor* and *Denton* were joint executors with *J. A.*, and survived, and to them the sole right of executorship to *C. A.* accrued by survivorship, though they never concurred in proving the will, nor acted as executors. And he cited *House and Downs v. Lord Petre* (a), to that effect. Secondly, He said that as the defendant acted under the advice of *Denton*, she could not be liable as executrix de son tort; for *Denton* being lawful executor, was competent to act himself before probate, and might also before probate authorize the defendant to act; and he who having authority to act in any matter, consults with and advises another to act therein, does for this purpose authorize him to act. And so the jury were mistaken in supposing that though the defendant acted under the advice of *Denton*, she was nevertheless liable as executrix of her own wrong, for a person cannot be executrix of her own wrong who acts under a rightful executor. And as to the defendant's proving a debt under the commission as representing *C. A.*, it is too much to fix her upon that account as executrix.

(a) *Salk* 311.

^b Lord ELLENBOROUGH C. J. Admitting that *Denton* was rightful executor, yet if the defendant interfered in an assumed character of executrix, and if never being executrix she acted as such, and made claim in that character, may she not be charged as executrix de son tort? It is truly said that she was not executrix of *C. A.* as being executrix of *J. A.*, because there were other executors of *C. A.* surviving, but the question is, has she acted as such. We are not called upon to say what might be the effect of *Denton's* making probate, and confirming all the acts which she has done, but as the case stands at present she is clothed with no right herself, nor derives any from others who might have assumed it.

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 ———
 COTTE
 against
 ALDRICK.

LE BLANC J. It is clear that *Denton* was the legal representative of *C. A.* upon the death of *J. A.* and might have clothed himself with a perfect title. During the life of *J. A.* inasmuch as the defendant was acting under a power of attorney from him, her acts were referable to his right; but by the death of *J. A.* her authority was determined. *Denton* might then have come in and proved, or without proving might have taken the effects and acted as executor; but he did not do so. It was contended at the trial that upon the evidence it was to be taken that the defendant was acting as agent for *Denton*, but I thought it a strong piece of evidence against such a conclusion, when it was proved that she came under a different character to claim a debt as executrix to *J. A.* who was executor to *C. A.* That coupled with the rest of the evidence shewed that she was not acting merely as the agent of *Denton*.

Per Curiam,

Rule refused.

1815.

Tuesday,
May 30th.DOE, on the several Demises of HUTCHINSON
and Others *against* PRESTWIDGE.

A., B., C., tenants in common in tail, B. releases to A. and C. and their heirs all his undivided part, and all his estate and interest therein, habend. to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the use of them, their heirs and assigns, and B. covenants with A. and C., their heirs and assigns, that he, his heirs, &c. would warrant and for ever defend the premises to A. and C. (without the word heirs) against all persons, and that A. and C., their heirs and assigns, should quietly enjoy, &c. : Held that the release passed the interest of B. to A. and C. as tenants in common, and not as joint-tenants, and that the warranty annexed to the release created a discontinuance of B.'s estate tail, and barred B. and those claiming under him, as against those claiming under the release, of a subsequently-acquired right in fee.

IN ejectment for two undivided third parts of a messuage and lands in the parish of *Alfreton*, which was tried before *Thomson B.* at the *Derbyshire Summer assizes 1813*, there was a verdict for the plaintiff upon a case stated, which in substance was this :

Francis Stacy being seised in fee of the said messuage and lands by indenture 3d September 1714, between himself and his wife of the 1st part, *Thomas Gilbert* of the 2d, and *Thomas* and *Ann Gilbert*, son and daughter of the said *Thomas Gilbert*, and grandson and grand-daughter of the said *Francis* and his wife, of the 3d part, covenanted for himself and wife to levy a fine (and a fine was accordingly levied) to the uses (among others) of the said *Ann* for life, and from and after her decease *to the use of all her sons lawfully begotten and the heirs of their bodies equally to be divided amongst them, to hold as tenants in common, and not as joint tenants*, and for default of such issue to the use of all the daughters of the said *Ann* and the heirs of their bodies, and for default of such issue to the use of *Thomas* the father, his heirs and assigns for ever. *Ann* became seised, married one *Brown*, and died intestate in 1744, leaving three sons *Thomas*, *Gilbert*, and *Henry* ; who became seised upon her death as tenants in common in tail, and were possessed and received the rents and profits. Afterwards *Gilbert Brown* by indentures of

lease and release 1752, between himself of the one part and *Thomas and Henry*, his brothers, of the other, in consideration and in exchange of certain customary or copyhold lands surrendered or agreed to be so by his brothers to him, and in consideration of 5s. paid by him to his brothers, the receipt of which they acknowledged, and for divers other causes and considerations, granted, bargained, sold, aliened, released, and confirmed to *Thomas and Henry* (in their actual possession then being by virtue of the lease, &c.) and their heirs, all that his undivided part, share, and interest, in the premises, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereout, and also all his estate, right, title, interest, benefit, property, profit, claim, and demand whatsoever, in law or equity, *Habendum to them, their heirs and assigns as tenants in common, and not as joint tenants, to the only proper and absolute use and behoof of them, their heirs and assigns for ever.* And *Gilbert* for himself, his heirs, executors, and administrators, covenanted with the said *Thomas and Henry*, their heirs and assigns, by those presents, that he, his heirs, executors, administrators, and assigns, would warrant, and for ever defend the premises to the said *T. and H.* against himself, his heirs, executors, administrators, and assigns, and against all and every other person whatsoever, and that they, their heirs and assigns, should peaceably hold and enjoy without any lawful let or demand in law or in equity, of himself, his heirs, executors, administrators, or assigns, or any of them, or any other person or persons whatsoever, and also that he, his heirs, executors, administrators, and assigns, and all and every other person then having or lawfully claiming any estate or interest in the premises, would from time

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to time, at the request and charge of his brothers, their heirs or assigns, make such farther assurance to his brothers, their heirs and assigns for ever, as by them, their heirs and assigns, or any of them, should be reasonably required. The customary or copyhold lands agreed to be surrendered were upon the execution of the lease and release duly surrendered to *Gilbert*, to the use of him and his heirs, and he was admitted. *Henry* died before *Thomas* leaving two sons. Afterwards *Thomas* died intestate and without issue, leaving *Gilbert* his heir at law, who was also heir at law of *Thomas Gilbert* the elder, named in the deed of 1714. Afterwards *Gilbert*, by indentures of lease and release, conveyed his interest in the premises to the lessors of the plaintiff, in fee, having previously levied a fine and suffered a recovery of a moiety of the whole estate, and he died unmarried. The defendants were the two daughters of *Henry's* eldest son who died, and they defended for an undivided fourth of the 2-3ds, they and those under whom they claimed having been in possession of it ever since the execution of the lease and release of 1752. And the question for the opinion of the Court was upon the effect and operation of that lease and release, so far as respected the interest of *Gilbert Brown* in the premises.

Reader for the plaintiff, argued upon a former day in the last term, that the lease and release without the warranty could pass no right but that which *G.* the releasor had at the time of the release, for it was a rule that nothing can pass by a release but that which may lawfully pass; yet he admitted that a warranty annexed to a release might rebut and bar the releasor and his heirs of a future right which was not in him at the time.

time (a). But then a warranty which is to have such an effect, and is to create a discontinuance of the estate tail, ought to be construed strictly; and therefore if tenant in tail release, and bind him and his heirs to warrant the land to the relesee, without saying *and to his heirs*, this is no discontinuance. For thus it is laid down, "if a man doth warrant land to another without this word, heirs, his heirs shall not vouch (b)." Again in the case of the Executors of *Grenelife v. W.* (c), this case is put, "if a man make a feoffment in fee, and warranty to the feoffee only without mentioning his heirs, the warranty shall enure for life only, because it is taken strictly." And again, "if a man warrant land to B. and his assigns, the assignee must vouch during the life of B., for the warranty continues but during the life of B., for it is but for life for want of words of inheritance (d)." Now the warranty in this case is to the relesees only without their heirs, for although it goes on that they and their heirs shall peaceably enjoy, yet that is no part of the warranty, which precedes it, and is confined to T. and H. And therefore this shall work no discontinuance, but shall enure only to the relesees themselves. And supposing it were a discontinuance, yet being for the lives of T. and H. only, when they died, G. became tenant in tail again, as he was before, because by the deaths of the relesees the discontinuance is determined. (e)

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J. Balguy for the defendants contended that the lease and release passed not only the present but all future

(a) *Co Lit.* 265. a. 328. a. *Lit. s.* 601. *Gill. Ten.* 120.

(b) *Co. Lit.* 384. b. (c) *Dyer*, 42. b. (d) *Co. Lit.* 47. a.

(e) *Co. Lit.* 333. a.

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interest of *Gilbert*, or at least that it operated as a bar to *G.* and such as claimed under him, as against those claiming under the release. For the release doth in effect warrant the land to *T.* and *H.* and their heirs, notwithstanding the word *heirs* doth not immediately follow the word, *warrant*, because *G.* covenants for himself and his heirs with *T.* and *H.* and their heirs; and if a man covenant with another and his heirs to warrant the land, this is a warranty to the heirs, and they shall vouch. Therefore this being a release with a warranty to descend, *ex concessis* it worketh a discontinuance, and the son of *G.* could not have entered after *G.*'s death, but would have been barred; the reason of which is for avoiding circuitry of action (*a*). And whether this warranty passeth the right, or may be used only by way of rebutter, is immaterial to the defendants; in either case the plaintiffs are not entitled, for they cannot stand in a better situation than *G.* himself.

The Court having intimated an opinion that the lessors of the plaintiff were barred by the release in respect of such part of *G.*'s interest as *H.* took under the release, and for which the defendants claimed to defend under the release, *Reader* made another point, viz. that whatever interest passed by the release to *T.* and *H.* passed to them as joint tenants and not as tenants in common; consequently at the death of *H.* living *T.* the whole survived to *T.*, and no part descended under the release to the defendants.

And as to this point farther time was given him to speak, until this day, when he admitted that

(a) *Co. Lit.* 265. c.

T. and

T. and *H.* took as tenants in common, for the habendum is "to them, their heirs and assigns, as tenants in common, and not as joint tenants, to the use of them, their heirs and assigns," and although if this had been an use executed by the statute, the consequence would be that they were joint tenants, yet he admitted that where the person seised to the use and cestui que use, is the same, the statute does not operate. And for this he cited Lord *Bacon*, "that the statute ought to be expounded, that where the party seised to the use, and the cestui que use is one person, he never taketh by the statute, except there be a direct impossibility or impertinency for the use to take effect by the common law." (*a*)

Wherefore judgment passed for the defendants.

(*a*) *Bac. Law Tracts*, 352. 2d edit.

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YOUNG *against* MUNBY.

Tuesday,
May 30th.

CASE. The plaintiff declares, as rector of the rectory of *Gilling* in the county of *York*, against the defendant as executor of *Piggott*, the late rector, that by the laws and customs of the land of this kingdom of *England*, &c. rectors are bound to repair the houses, buildings, tenements, chancels, and pews belonging to their rectories, and to leave the same well and sufficiently repaired to their successors; and in default thereof then that the executor or administrator of such rector, after his decease, is bound to satisfy the successor such a sum as is sufficient for the reparation of such of the premises as are left unrepaired and dilapidated, and that *Piggott* was seised in right of his rectory of a certain

The successor may have separate actions against the executor of the late rector, for dilapidations to different parts of the rectory.

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tain pew in the church, and was bound to keep it as well as the chancel in repair, and that *Piggott* died seised of the rectory, and that the plaintiff succeeded; and that at the time of *Piggott's* death the chancel of the church and the pew were ruinous and in decay for want of repair, and that the expence of repairing the same would amount to 100*l.*, of which the defendant had notice, yet the defendant hath refused to pay the said 100*l.* &c.

Plea in bar; that heretofore before the commencement of this suit, to wit, in *Trinity* term, 54 G. 3., the plaintiff impleaded the defendant as executor as aforesaid in this court in a plea of trespass on the case, setting forth a declaration in the same form as the above, for want of reparation of *the rectory house, outhouses, and cottages belonging to the rectory, and of the gates and hedges upon the glebe lands, &c.* And such proceedings were thereupon had, that afterwards in *Michaelmas* term the plaintiff recovered against the defendant as such executor 28*o**l.* 6*s.* for his damages, &c. as by the record, &c. And the plea alleges that the same state of ruin and decay of the chancel and pew in the declaration in this action mentioned, existed before and at the time of the commencement of the former action, and that the damages now sought to be recovered might have been included in the former action, and recovered therein, &c.

Replication, denying that the damages sought to be recovered in this action were in any manner included in the declaration mentioned in the plea, nor were the same or any part thereof recovered in the action mentioned in the plea.

Demurrer. Joinder.

Tindal

Tindal in support of the demurrer argued that a plaintiff is not at liberty to subdivide one entire cause of action, and to bring so many separate actions as there may be consequences resulting from it, but that he is bound to include all the consequences under one action, and to recover damages for them once for all. As if a man recover in assault and battery, he shall not be allowed afterwards to have a new action for the same battery, though it be for other damages, as for a laceravit, maihem, &c.; but the defendant shall plead the former recovery in bar, and aver it to be for the same cause, and it shall be a good bar, though it be shewn that the new damage accrued since the first action (a). So the plaintiff shall not have an action of trespass for digging under the foundation of his house, per quod it fell, and he lost all benefit and profit of his house; and another action upon the case for digging so near his house that it fell, and he was compelled to quit it, together with his trade, if it appear that the digging is the same in both; for the words, that he lost all benefit and profit of his house, in the first action, include the trade of his house, and the damages for the loss of it (b) in the second. So for the same words the plaintiff shall not have a new action by a new interpretation of them (c). And even where the action is of a higher nature, it shall be barred by a recovery in an action of an inferior nature, as an appeal of maihem shall be barred by an action for the battery and wounding (d). In like manner, in the case at bar, the cause of action

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(a) *Petter v. Beale*, Salk. 11.(b) *Barnard v. Keasey*, 3 Lev. 179. Per three Justices against Young C. J.(c) *Gardner v. Helvis*, 3 Lev. 248.(d) *Hudson v. Lee*, 4 Rep. 43. S. C. 1 Leon. 318.

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being for dilapidations to the rectory by the last incumbent, for which the plaintiff has already recovered damages in respect of several parts of the rectory, and as the damages to the other parts might all have been included in that recovery, he shall not be permitted to split the damages, and to maintain a new action for the same cause by alleging a new damage. And great hardship would ensue if it were otherwise, for then the Defendant might be harassed with as many actions as there are divisible portions of damage, as for the damage in each room of the house, or in each acre of the glebe, &c.

Scarlett, contra, denied that the former action was for the same cause as the present, an injury to the house and glebe, being a distinct cause of action from an injury to the chancel and pew. And he relied on *Seddon v. Tutop* (a); *Hitchin v. Campbell*. (b)

LORD ELLENBOROUGH C. J. There seems to be no doubt in this case. If the defendant could make out that an injury caused by dilapidations was one entire identical injury, forming precisely the same cause of action for every part of it, then he would be right that the plaintiff could have but one action for it. But I have not heard any authority cited to that effect; nor does it appear to me that there is any reason why this should be considered as one entire cause of action compounded of the several injuries sustained in the several parts. They are different and independent injuries in respect of the different parts: the injury from the dila-

(a) 6 T. R. 607.

(b) 2 Bl. R. 827. S. C. 3 Wils. 304.

pidation of the house is one thing, that from the dilapidation of the chancel is another; and the causes are distinct; the latter might not be consummate at the time when the first was. It seems to me therefore that the plaintiff may maintain this action as convenience or subsequent discoveries enable him. It is to be regretted indeed that two actions should be necessary, but if what has been suggested at the bar, that the defendant would not consent at the trial of the former action to the chancel's being included, be correct, this second action may be laid to his fault.

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LE BLANC J. If the omission to repair one house could be considered as an omission to repair another, the defendant's argument would be well; but that cannot be. And as to the hardship, the Court will always interfere if they see that the action is brought for oppression's sake.

BAYLEY J. In assault and battery the injury is not the ground of action, according to Lord *Holt* (a), but the measure of the damages, which the jury must be supposed to have considered at the trial; the injurious act, which is the battery, is the ground of action.

Per Curiam,

Judgment for the Plaintiff.

(a) See *Fetter v. Beale*, *Salk.* 11.

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Tuesday,
May 30th.JONES and Another *against* KING.

Covenant lies by the heir, upon a covenant made to the ancestor and his heirs, to whom lands are conveyed in fee by husband and wife, that he and his wife will make further assurance upon request of the ancestor and his heirs; and the heir may well assign for breach, that his ancestor requested the husband, that he and his wife would levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do before their decease, per quod after the death of the ancestor the devisee of the wife ejected the heir.

ERROR to reverse a judgment in covenant given in the Common Pleas against *Jones* and *Newland* executors of *Griffith* (a). The plaintiff below declares that by indenture 7th October 1794, between one *Worge* of the first part, the said *Griffith* and wife of the second, and one *King* now deceased of the third, *Worge* by the direction of *Griffith* and wife, in consideration of 300*l.* paid to him by *King* at their request, in discharge of a mortgage, and of 855*l.* paid to them, *Griffith* and wife, did bargain, sell, assign, alien, and release, and *Griffith* and wife did grant, bargain, sell, alien, release and confirm, to *King*, his heirs and assigns, a messuage, lands, and premises, with the appurtenances, &c. described in the indenture; habendum to *King*, his heirs and assigns, to the only proper use and behoof of *King*, his heirs and assigns for ever: and *Griffith* for himself and wife, and for their and each of their heirs, executors, and administrators, did covenant with *King*, his heirs and assigns, that they and their heirs, and all and every other person having or lawfully claiming, or who should or might at any time thereafter have or lawfully claim, any estate, title at law or in equity in or to the said messuage, &c. or any part, should from time to time, and at all times thereafter, upon reasonable request and at the cost of *King*, his heirs and assigns, make and execute all farther acts and conveyances for farther assuring the said messuage, &c. to the use of *King*, his heirs and

(a) See 5 Taunt. 418. 1 Marsh. R. 107. S. C.

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assigns for ever, as by *King*, his heirs or assigns, should be reasonably required, so as such farther assurances should contain no farther warranty or covenants than against the persons or their heirs, who should make the same, and so as the persons required to make the same should not be compelled to travel, &c. And the plaintiff avers that *King* entered and was seised, and died seised, whereby all his estate, &c. descended to the plaintiff, as his son and heir, and he became seised; and the plaintiff assigns for breach, that *King* in his lifetime for better assuring the said messuage, &c. requested *Griffith* that he and his wife at the cost of *King* would levy a fine to pass the estate of the wife legally to *King* and his heirs, which they refused and neglected to do before their decease, by means whereof afterwards, and after the death of *King*, one *J. Johnson*, the devisee of the wife, by reason of no such fine having been levied, having a lawful title to the said tenements, &c. entered and lawfully ejected the plaintiff, and hath lawfully kept and still keeps him so ejected, contrary to the covenant of *Griffith*, &c.

And after several pleas upon which issues were joined, there was a verdict for the plaintiff on all the issues, for 950*l.* damages, and judgment thereon. And the errors assigned were, first, that the declaration and matters therein are not sufficient in law; secondly, that by the declaration it appears that the covenant for the non-performance of which this action is brought, was broken in the life-time of the said *King* deceased, for which reason the action, if any, ought to have been brought by and in the name of his personal representative, and not in the name of the plaintiff; thirdly, the general error. Joinder in error.

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Scarlett, in support of the errors, endeavoured to distinguish this case from *Kingdon v. Nottle* (a), where covenant was held to lie for the devisee of land in fee, upon a covenant for a good title made with the deviser, to whom the land was conveyed in fee; first, because that was a covenant for a good title absolutely, but this covenant for farther assurance is not absolute but depends upon whether a request shall be made by *King* or his heirs, and the plaintiff has not shewn that he made any request, but only that *King* did. And in *Middlemore v. Goodale* (b), where this action was held to lie for the assignee of *J. S.* upon the like covenant with *J. S.*, his heirs and assigns, the assignee averred that he made a request. But in this case, without a request by the plaintiff the breach is wholly with the ancestor, for which his personal representative and not his heir shall have an action. Secondly, It is distinguishable from *Kingdon v. Nottle*, because that was a covenant for warranty of title upon a conveyance in fee; and if a man grant lands to another in fee by such conveyance as will pass a fee, and covenants that he has a title, a fee passes, and the covenant which is real descends with the fee; but it is otherwise, if by the grant an estate which is not descendible to the heir passes, but only a lesser estate, for then there is nothing to carry the covenant along with it to the heir. And therefore in this case, since a fee did not pass in the lands by reason that they were the wife's lands, and there was not any fine, but an estate for the life of the husband only passed, which came to the heir as special

(a) *Ante*, 53.(b) *Gro. Car.* 503.

occupant after the death of his ancestor, and not by descent, so neither did this covenant descend to him.

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Hobroyd, contra, cited Fitz. N.B. 145. C. "that if a man covenant by deed to another and his heirs to infeoff him and his heirs of the manor of *D.*, and will not do it, and he to whom the covenant is made die, his heir shall have a writ of covenant upon that deed."

And *per Curiam* that seems to make an end of this case. For here the party professes to convey a fee in the lands, and covenants with the heir that he will do all things necessary to assure the same, that a fee may descend to the heir if it be not intercepted by the ancestor, and the ancestor has not intercepted it, and the heir is damnified, inasmuch as a fee has not descended to him, which it would have done, if the party had fulfilled his covenant, and performed the act required.

Judgment affirmed.

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Tuesday,
May 30th

CARSTAIRS and Others, Assignees of KENSINGTON and Others, Bankrupts, against STEIN and Others.

Whether a commission of one-half per cent. upon a banking account be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expence, or whether it be a colour for the payment of interest above 5l. per cent. upon a loan of money, and if there be a contrariety of evidence upon that point, the Court will not set aside the verdict and grant a new trial, although the verdict be against the opinion and direction of the judge who tried it; unless it appears clearly that the jury have drawn an erroneous conclusion.

In an action brought under the Chancellor's order, a

new trial may be moved for in the court where the action is depending, though the action could not be sustained without the aid of the Chancellor's order.

ASSUMPSIT for work and labour done by the bankrupts before their bankruptcy, for money due to the bankrupts for certain commissions executed by them on account of the defendants, for other money due to the bankrupts for interest of money lent and forborne, with the common money counts. Plea, non assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings, after last *Michaelmas* term, the case in substance was thus:

Kensington and Co. were bankers in *London*; the defendants had a house of trade in *London* under the firm of *Stein, Smith, and Co.*, and also a house of trade at *Edinburgh*, under the firm of *Scott, Smith, Stein, and Co.*, there being no such person as *Scott*, he being dead. In the beginning of 1803 *Kensington* and Co. opened a banking account with the *London* house; and in *August* of the same year they opened another account with the *Scotch* house, at the instance of *Smith*, who was the principal manager, under an agreement that they, *Kensington* and Co., should allow the *Scotch* house to draw upon them to an extent not exceeding 20,000*l.* to be running at one time, taking a commission of 10*s.*, i. e. one-half per cent. upon the amount of the bills drawn, and that they should not be required to make any advance of money. The business for which this commission was said to be

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agreed upon, was the accepting and paying the bills of the *Scotch* house, taking charge of their remittances, and obtaining acceptance and payment of them, some in *London*, others in the country, sending notice when they were refused acceptance or payment, and getting them noted, and negotiating their foreign bills. The whole of this business was transacted by the direction of *Smith* with the *London* house, to which the *Scotch* house also referred as to their friends in *London*, and nearly all the funds that were remitted to *Kensington* and *Co.*, on account of the *Scotch* house, came through the *London* house. However the *London* and *Scotch* accounts were kept distinct and by different clerks during the whole transaction. Before the opening of the *Scotch* account *Kensington* and *Co.* having become much in advance to the *London* house, refused several times to honour their drafts, and the *London* house stood overdrawn for 30,000*l.* at the first opening of the *Scotch* account. Afterwards, and for the first three years after the opening of the *Scotch* account, the *London* house continued overdrawing and increasing the balance against them, the interest upon advances to them for that time amounting to nearly 5,000*l.*, while the *Scotch* house during the same time kept *Kensington* and *Co.* nearly free from advance, the interest upon advances for that time to the *Scotch* house amounting to no more than 87*l.*, but the commission amounted to between 5,000*l.* and 6,000*l.* This was effected by means of remittances made through the *London* house to the credit of the *Scotch* house, which kept down the balance of the *Scotch* house upon their drawing account with *Kensington* and *Co.*, but increased the balance against the *London* house. Thus things went on till *June* 1806, when a me-

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memorandum of an agreement was made, which was proved to have been shewn to and corrected by one of the partners of *Kensington and Co.*, and which was entitled between *T. Smith, J. Stein, R. Stein, and R. Smith*, of *Fenchurch-street*, in the city of *London*, merchants and partners, carrying on business under the firm of *Stein, Smith, and Co.*, and also carrying on business at *Edinburgh* under the firm of *Scott, Smith, Stein, and Co.* of the one part, and *Kensington and Co.* of the other, for the depositing with them, *K. and Co.*, certain securities for the payment of all present and future advances and interest, &c. made by them to the firm of *Stein, Smith, and Co.*, or of *Scott, Smith, Stein, and Co.* And in this memorandum it was recited that *Smith* and his said partners had for some time past kept accounts with *Kensington and Co.* as their bankers, under the firms of *Stein, Smith, and Co.*, and of *Scott, Smith, Stein, and Co.*, and that they had applied and might have occasion again to apply to *Kensington and Co.* for discounts and advances, &c. After this *Kensington and Co.* went on dealing with both firms until *July 1812*, when in consequence of the magnitude of their advances they were obliged to stop payment, and a commission of bankruptcy issued against them, and soon afterwards a commission issued against both firms of *Stein, Smith, and Co.* The balance claimed to be due from the *Scotch* house to *Kensington and Co.* at the time of their bankruptcy amounted to 314,581*l.* 3*s.* 6*d.*, of which the sum of 53,000*l.* was for commission, and from the *London* house to 54,448*l.* 15*s.* 4*d.* These balances were reduced by counter claims on the part of *Smith, Stein, and Co.* to 291,000*l.*, for which this action was by the direction of the Court of Chancery brought
against

against the defendants. There was a contrariety of evidence as to the nature of this commission of one-half per cent., and its reasonableness in respect of trouble, &c. upon a banking account, many of the witnesses stating that the accustomed charge for commission upon a banking account, never exceeded one-fourth per cent. Lord *Ellenborough* C. J. directed the jury upon the evidence, that if the commission could be fairly set to the account of trouble and inconvenience, it was not usurious; otherwise if the commission overstepped the bonâ fide trouble, and was mixed with an advance of money in order to effect an inducement for such advance from time to time. And His Lordship inclined in his charge to the jury, to the conclusion, that this commission was under the circumstances usurious; but left that question upon the evidence to the jury; and the jury found for the plaintiffs.

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In *Hilary* term *The Attorney-General* moved for a new trial, upon the ground that this was a verdict contrary to evidence and the direction of the Judge. But the Court doubted, whether as this was an action commenced against the defendants, by order of the Court of Chancery, and which could not have been sustained but that the order restrained the defendants from setting up their bankruptcy, this motion ought not to have been made, as in a feigned issue, before the Lord Chancellor; and so they directed that application should first be made to His Lordship, if he should think fit to entertain the motion. Whereupon the *Attorney-General* left the Court, and returning soon afterwards, stated that he had applied to the Lord Chancellor, mentioning to him what had taken place here, and that

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His Lordship said, it was the constant rule of the Court of Chancery, when it directs an action, not to consider it as having been tried, unless the Court in which it is depending is satisfied with the verdict, and although the parties might not be able to stand in court without the aid of the Court of Chancery, yet that makes no difference, the rule being that so long as there remains any thing to be done to make the verdict satisfactory to the Court, the cause has not been tried. Whereupon a rule nisi was granted, and cause was shewn, partly in the last term, and partly in this.

Topping, Dauncey, Abbott, and Richardson, who shewed cause, argued, that in the judgment of *Eyre C. J.* and *Rooke J.* in *Hammett v. Yea* (a), the question, whether usury or not, was a question of fact for the consideration of a jury, which must always be collected from the whole transaction, and cannot be determined upon any particular fact as constituting usury, until all the circumstances have been taken into consideration. And therefore where money is advanced under particular circumstances, a man may be warranted in receiving more than 5 per cent. as for expence, risk, and trouble. For in order to constitute usury there must be a corrupt contract, a loan, and forbearance (b); and putting a loan out of the case, a banker may, if he please, traffic with his credit, and receive a price for lending his acceptance, without incurring the guilt of usury (c). And in *Curtis and others, assignees of Gibson v. Livesey*, London sittings after Hilary term

(a) 1 B. & P. 144.

(b) *Lloyd v. Williams*, 3 Wils. 261. S. C. 2 Bl. R. 792.

(c) Per *Eyre C. J.*, in *Hammett v. Yea*, 1 B. & P. 153. *Barclay v. Walmesley*, 4 East, 55. *Masterman v. Cowrie*, 3 Campb. N. P. C. 488.

1790, which was an action brought by order of the Chancellor to try a question of usury, and was in the same form as the present action, for money due for commission and interest, &c., it appeared that *Gibson* and Co. bankers in *London*, opened a banking account with the defendants' house of trade in *Manchester*, upon an agreement that they should receive 5 per cent. besides interest on all monies paid and advanced by them. The defendants had also another house of trade in *London*, and the bills drawn by them upon the *Gibsons* were dated and signed at *Manchester*, but were filled up in *London*, and carried from the *London* house to the *Gibsons*, and were payable in *London*, and the letters of advice were dated *London*, and also sent to the *Gibsons* from the *London* house. And evidence was given to shew that this was opened as a country account, by way of getting a commission upon what was in reality a town account. But it was ruled by Lord *Kenyon* that commission was lawful; and he said the only question was, whether it was reserved as a colour for usury upon a loan of money, or for trouble. That for trouble in transacting money negotiations a banker may as well receive a commission as a factor may for trouble in making sales, &c. So in the case at bar the question was for the jury, whether, under all the circumstances, this was a colour for reserving more than 5 per cent. upon a loan of money, or for trouble, &c. And the jury have determined it.

Nor is it a matter of course to grant a new trial, because in the opinion of the judge who tried it the verdict is against the weight of evidence. If the Court see that justice and equity have been done (*a*), or that it is a

(*a*) *Duchess of Mazarine's case*, 2 *Salk.* 646. *Burton v. Thompson*, 2 *Burr.* 665. *Camden v. Cowley*, 1 *Bl. R.* 418. *Aylett v. Lowe*, 2 *Bl. R.* 1221. *Goslin v. Wilcock*, 2 *Wils.* 302. *Edmonson v. Machell*, 2 *T. R.* 5. *Cox v. Kitchen*, 1 *B. & P.* 338.

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hard action (*a*), or that there is a contrariety of evidence (*b*), it is not their habit to grant a new trial, although the verdict be contrary to evidence, or in the opinion of the judge who tried it against the weight of evidence. And that the verdict here is plainly with the justice and equity of the case, there can be little doubt.

The Attorney-General, Park, Scarlett, and F. Pollock, contra, admitted that it was in general true, that where the verdict is founded purely upon a question of fact, and where there is conflicting evidence, the Court will not grant a new trial, although the inclination of the judge who tried it may be against the verdict. Yet they said there were exceptions to that rule; as if the verdict be *manifestly* against the weight of evidence; or if from the intricacy or bulk of the evidence there is reasonable doubt whether it was thoroughly understood. And several of the cases cited contra were before the practice of granting new trials had become so general as now, or was so well understood, particularly the Duchess of *Mazarine's* case, which, however it might be considered in *Cor v. Kitchen* as a leading decision upon the subject, does not seem to have been acted upon by the Court, for they decided upon a different point. And if the verdict include a legal consequence as well as a proposition of fact, and in drawing this consequence the jury mistake, and infer contrary to law (*c*), then it is absolutely necessary to justice, and the Court does interpose to grant a new

(*a*) *Smith v. Frampton*, 1 Ld. Ray, 62. S. C. Sulk. 644.

(*b*) *Francis v. Baker*, Bac. Abr. Trial. L. 4. *Swain v. Hall*, 3 Wils. 45.

(*c*) Per Ld. Mansf., 1 Burr. 393.

trial.

trial. Now in this case the jury have taken upon them to decide, without any proof that such was the usage of the trade, which was a fact proved in *Floyer v. Edwards* (a), or rather against such proof, that this commission of one-half per cent. may lawfully be taken by bankers; this being the first time that such a rate of commission as the present has been set up, the former cases going no farther than one-fourth per cent. (b)

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LORD ELLENBOROUGH C. J. observed that the question came to this, whether the commission could be considered as a reasonable charge for trouble; for there was no rule of law that it shall not exceed one-fourth per cent., though the former cases turned upon a commission at that rate. That as this case in point of amount, and in some measure of principle, was of great consequence, the Court would consider it.

Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. The question before us is not whether the verdict given in this case is such as we should ourselves have given, but whether having been given by a jury, to whom the whole case was fully left in point of fact, and to whom the law upon the subject was distinctly stated, it ought upon the grounds of argument suggested to us, to be now set aside and a new trial granted. We cannot discover any question of law upon which the jury were misdirected, or (being directed as they were) upon which they have come to an erroneous conclusion. All the questions which this

(a) *Cowp.* 112.

(b) *Winch v. Fenn*, 2 T. R. 52. n. *Masterman v. Cawrie*, 3 Campb. N. P. C. 488.

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case presented for their immediate consideration, were questions properly of fact, upon which, and upon the credit due to the several witnesses by whom the testimony was given, it was their peculiar province to decide. As far as in the evidence which has been reported, any contradiction is to be found, the jury must (in this as in all other cases) be presumed to have given credit to such of the witnesses as were best entitled to belief, unless the contrary should distinctly appear to have been the case; and as to their deduction from the whole of the testimony, it ought in general to have effect given to it, unless it appears clear that the jury have drawn an erroneous conclusion. The Court in granting new trials does not interfere, unless to remedy some manifest abuse, or to correct some manifest error in law or fact. The principal question has been, whether the one-half per cent. agreed to be charged for commission in this case, is clearly referable to an usurious contract between the parties for the payment of interest above 5 per cent. upon a loan of money, or whether it may not be referred to an agreed measure of remuneration, justly demandable for trouble and expence incurred in the accepting and negotiating bills remitted to and drawn upon them, and in the doing such other business as is stated to have been done by the *Kensingtons* for the houses, or rather for the house, of the defendants, under its different names and descriptions. It must I think be taken that in the year 1806, at least, the *Kensingtons* knew that the two houses consisted of the same individuals as partners, and of no others, and that further advances were then expected and intended to be made to them by the *Kensingtons* at the formerly agreed rate of commission, viz. of one-half per cent, and that such advances were continued to be made

made to them accordingly, down to the period of their respective failures. Commission cannot be added to the amount of legal interest for the purpose of inducing a loan of money to be made, and of recompensing it afterwards when made. All commission, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expence bonâ fide incurred, in the course of the business transacted by the persons to whom such commission is paid; but whether any thing, and how much, is justly ascribable to this latter account, viz. that of trouble and expence, is always a question for the jury, who must, upon a view of all the facts, exercise a sound judgment thereupon. There has been much contrary evidence given upon this subject, particularly as to the question of commission properly demandable for this description of trouble and expence; and in order to set aside this verdict, we ought clearly to see that the jury have disbelieved what they ought to have believed on this head, or have believed what they ought to have disbelieved; and that they, in consequence, have erroneously considered a larger amount of commission for trouble and expence as allowable in this case, than could fairly be allowed. This, upon the fullest consideration of the evidence, we cannot distinctly see to have been the case. That there are circumstances in this case strongly pregnant of suspicion, and which lead to a conclusion different from that which the jury have drawn, cannot be denied: a striking circumstance of this kind is, that after an agreement made by the *Steins* at a period of great pecuniary pressure in their affairs, when advances were most necessary to them, by which agreement it had been

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been stipulated in terms that the banking-house of the *Kensingtons* should be kept from advance in every respect, they, the *Kensingtons*, did nevertheless almost immediately become in advance for them; and though the interest paid by the country and *Scotch* house, as it is called, on such advances, was so contrived as not to amount to more than 87*l.* in the first three years, yet the interest on advances during the same period to the *London* house amounted to 5000*l.* and the commission to about the same sum. There is likewise a very suspicious machinery in the constitution of two houses, (under different firms, but consisting of precisely the same individuals,) as well as in the substance of the dealings with them, formed, as it is said, on the basis of there being no advance to be made by the *Kensingtons*, whereas an advance, which commenced almost immediately, continued in an increased and increasing proportion, down to the respective failures of the different parties. These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required, but which were in fact required, and made from the beginning to the end of this business. But this question, i. e. whether colour or not, was a question for the consideration of the jury, and to their consideration it was fully left, with a strong intimation of opinion on the part of the judge, that the transaction was colourable, and the commission of course usurious. The jury have drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw; and they having done so, for the reasons already stated, we do not feel ourselves, as a court of law, and

acting according to the rules by which courts of law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial.

Rule discharged.

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The KING *against* COMMERCIAL and ELLIS.

Wednesday,
May 31st.

THE inhabitants of the parish of *Slinfold*, in the county of *Sussex*, were presented by *A.* and *B.* the constables of the hundred, for not repairing a carriage road, which presentment was afterwards turned into an indictment at the Quarter Sessions, and the names of *A.* and *B.* indorsed thereon as the witnesses. Notice was given by the parish that they would appear and plead not guilty, and try at the next sessions, which notice was entitled "The King, on the prosecution of *A.* and *B.*," &c. and was signed "*D. S.* solicitor for the parish of *Slinfold*," and was directed to the clerk of the peace and to *A.* and *B.* Notice was also given by the defendant *Ellis* to the surveyors of the parish to produce their accounts, &c. at the trial, on the part of the prosecution, which notice was signed "*H. Ellis*, solicitor for the prosecution." Afterwards at the said sessions one of the inhabitants appeared, and pleaded not guilty to the indictment, and it was tried, and the parish were acquitted, whereupon the sessions made an order, entitled "The King, on the prosecution of *W. Commercial* and *H. Ellis*, against the inhabitants of the parish of *Slinfold*," whereby "the Court awarded

The sessions before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may by their order award *C.* and *E.* to pay costs to the parish, although the names of *C.* and *E.* be not on the back of the indictment, and although the indictment originated in a presentment of *A.* and *B.* constables, whose names are on the indictment; and it is enough if the order is intitled as in the prosecution of *C.* and *E.*, without shewing further that *C.* and *E.* are prosecutors; neither need it appear on the face of the order that the indictment was tried, if that be for the

appear by the record of the proceedings; and the order is good in form payment of the costs to the solicitor of the parish.

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and ordered the said *W. C.* and *H. E.* to pay to *D. S.* the solicitor for the above defendants in the said prosecution, 24*l.* 6*s.* 11*d.* as and for their costs therein." The bill of costs was entitled as in the prosecution of *Commerell* and *Ellis*.

And all this now appearing upon the return to a certiorari, *Courthope* in support of the order of sessions, adverted, 1st, to an objection that had been made to the order, at a former time when a part of the proceedings only was before the Court, viz. that it did not appear upon the face of the order that a trial had been had; to which the Court, he said, at that time answered that if it appeared upon the record of the indictment, &c. that would be sufficient; whereupon a certiorari went to remove the record. And now he observed the record did set forth that there had been a trial, and that the parish were acquitted. 2dly, As to the objection that *Commerell* and *Ellis* are not shewn to be the prosecutors, but are only so called in the title of the order. The stat. 13 G. 3. c. 78. s. 64., which enables the court to award costs to the prosecutor or person indicted, does not prescribe the form in which they shall be awarded; and so in *Rex v. Inhabitants of Clifton (a)*, it was holden that the judge at the trial indorsing that the defence was frivolous, was in effect awarding costs to the prosecutor. And if it were necessary to the well making an order upon the prosecutors for payment of costs, to shew that they were really prosecutors, the consequence would be that the justices must set out the whole evidence relating to that matter, which would introduce great length and inconvenience in the proceedings. 3dly, As to the objection that the costs are awarded to *D. S.*, and not to the in-

(a) 6 T. R. 344.

habitants of *Slinfold*, the answer is that the inhabitants as an aggregate body are incapable of having the costs paid to them.

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D'Ogby contra, objected that not only was it not shewn that *C.* and *E.* were prosecutors, but their being prosecutors was negatived, because it appears that it was the constables who made the presentment, and whose names were afterwards indorsed upon the indictment, and the parish have treated them as prosecutors by naming them such, and directing to them, and giving them a notice; after which they cannot turn round and name other persons prosecutors in their bill of costs. Neither can the sessions look beyond the record for the prosecutor, for the law has defined who the prosecutor is, viz. the person who prefers the indictment and goes before the grand jury; and therefore there is no necessity for any farther inquiry; and if there were, the sessions have not such a latitude of discretion as to be authorized to determine that a party has made himself prosecutor by giving a notice to produce books, &c. 2dly, The order for payment of costs is ill, because it directs them to be paid to the solicitor and not to the parish, whereas the statute from which alone the sessions have authority to award costs, directs that they shall award them to the *person indicted*. And though it may be true that here the costs could not be paid to the parish at large, and therefore possibly the order might be well executed by payment to their authorized agent or solicitor, yet that is no argument against making the order in the form prescribed by the act; for as well might it be argued that a parish cannot be indicted, because the parish at large cannot

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appear, but must appear by some individual representing it; yet it is the constant practice that the indictment is in form against the parish, and so is the precept or *distringas* against them. And in civil actions, in which attornies are the recognized agents for the parties, and whose names are entered on the record, it is never the practice for the Court to award costs to be paid to the attorney, but only to the parties themselves; and it would be ill so to do; a fortiori the sessions shall not do it, to whom an attorney is neither known as an authorized agent, nor is his name entered on the record.

Lord ELLENBOROUGH C. J. As to the last point, the sessions have adopted the only practicable construction which the act affords. For you must needs get rid of the letter of the act, because the letter is impracticable and cannot be followed; for you cannot deliver *capitatum* to each individual composing the inhabitants of the parish his quota of the costs. The argument however is, that, for the sake of the impracticable letter of the act, we must reject a practicable form. Perhaps this order might have been as well if it had awarded costs to the parish to be paid to their solicitor; but by analogy to legal proceedings in the superior courts, where the attorney is the authorized person to receive the debt and costs, the justices have at once ordered the costs to be paid to the solicitor, as to the person probably who made the disbursements on account of the parish. They order them to be paid to the only person of whom they have notice, except the person who pleaded to the indictment. If any exception had been made at the time to the solicitor's being appointed to receive the money, that might have formed a very fit subject

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subject of deliberation for the sessions; but in the absence of any other authority superseding the authority of the solicitor, I think the solicitor who gave the notice for the parish, and made the disbursements, was properly enough the person to whom the justices might direct the costs to be paid. As to the other point, whether the persons by whom the costs are directed to be paid were the prosecutors, in many cases it is not a matter of certainty who the prosecutor is; on the contrary, it may be a very nice and intricate question; for we know that in an action for a malicious prosecution, if the prosecutor be kept out of sight, it sometimes becomes a point of very subtle evidence to determine. But *id certum est quod certum reddi potest*, and it is a question to be ascertained by inquiry and evidence. And here the sessions upon inquiry have found who is the prosecutor, which, as it must very often be uncertain where there are more names than one on the back of the indictment, must always be incidentally the business of the sessions to inquire of and to decide. It is sometimes the business of this court to make that inquiry, as in *Rex v. Incledon (a)*, one question before the court was, whether Sir *A. Chichester* was the prosecutor. So in this case the sessions have found these defendants were the prosecutors, and this court will not interfere with that decision, unless it appeared that the sessions had corruptly or improperly so found, which would then be a proceeding of a different nature from the present. We must presume that the sessions have done right in fixing these persons with the character of prosecutors according to competent evidence before them.

(a) *Ante*, vol. i. 268.

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LE BLANC J. Both questions arise upon the stat. 13 Geo. 3. c. 78. s. 64., which enacts, "that it shall and may be lawful for the court before whom any indictment or presentment shall be tried, to award costs to the prosecutor, or to the person indicted or prosecuted," vesting in the court before whom the indictment is tried this authority. In order, therefore, to exercise this authority, the court must determine who the prosecutor is. And here the sessions have awarded costs against these two persons expressly as prosecutors; therefore the court, in whom the authority is vested, have determined that they are the prosecutors. They have also awarded the costs to be paid by them to *D. S.* the solicitor for the parish, the defendants in the prosecution. The words of the act are, "that they shall award costs to the person indicted or presented." And no objection is now made by the parish, or appears to have been made by them at the sessions, to the awarding the costs to be paid to this person as their solicitor; but we must take it, for they are supposed to be present in court, that they consented to the order's being so made. Therefore I cannot help thinking that it satisfies the words of the act, where we find the order directs the costs to be paid to a person acting as agent to the parish indicted, and with their consent.

BAYLEY J. It is always matter to be determined by inquiry whether a person is or is not the prosecutor. It does not necessarily follow that he whose name is on the back of the indictment must be the prosecutor; neither in *Rex v. Smith* (a), nor in *Rex v. Kettleworth* (b), was the prosecutor's name upon the indictment. If

(a) 1 Burr. 54.

(b) 5 T. R. 33.

these

these persons might have become entitled to receive costs, they may also be liable to pay them, if made out to be the prosecutors. As to the other objection, it seems to me that the solicitor was the most proper person to receive the costs. It is true the inhabitants might have objected; but they might be satisfied, and so might the sessions also that the solicitor had paid the whole expences out of his own pocket; and thus the matter would be settled between them; whereas if the sessions had ordered the costs to be paid to the individual who pleaded to the indictment, and if he had absconded with them, the solicitor would have been left to call on the rest of the inhabitants to reimburse him.

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DAMPIER J. Who the prosecutor is must be matter of inquiry. It does not follow that the constables were so because their names were indorsed on the indictment. It was for the sessions then to satisfy themselves upon that head; and they have done so, and have sufficiently made it appear by their order that these defendants were prosecutors. Upon the other point, the question seems to be, whether an order to pay to the acknowledged agent of the inhabitants who has disbursed the whole expences, is ill. And this seems to be determined by considering that it is the only practicable way of making the order efficient, and that it has been done with the concurrence of the inhabitants.

Order confirmed.

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Wednesday,
May 31st.

Where a person rented and resided on a tenement of 4*l.* a year, and in the same year bought at a public auction, on 12th *August*, four lots of oats growing in one field, for 12*l.* 14*s.*, which oats were of different kinds, that ripened at different periods, and he began to reap them on 14th *September*, and continued reaping them as they ripened, and carted them away at intervals between the 14th *September* and the 3d *November*, on which day he carted off the last load: Held that he did not thereby acquire a settlement.

The KING *against* The Inhabitants of BOWNESS.

UPON appeal, the court of quarter sessions for *Cumberland* quashed an order for the removal of *Elizabeth Wright*, single woman, from *Bowness* to *Kirkbampton*, subject to the opinion of this Court upon the following case:

The pauper had gained no settlement for herself, *John Wright* her father being settled at *Kirkbampton*, in 18 4 rented a dwelling-house, cow-house, and pasturage for his cow in *Bowness*, of the annual value of 4*l.* and resided upon it during that year. On the 12th of *August* in the same year he bought at a public auction four lots of oats growing in the same field at *Burgh* for the sum and of the value of 12*l.* 14*s.* The oats were of different kinds that ripened at different periods. He began to reap them on the 14th of *September*, and continued reaping them as they ripened, and carted them away at intervals, between the 14th of *September* and the 3d of *November* in the same year, on which day he carted off the last load. And the question for the opinion of the Court was whether under the above circumstances *J. Wright* gained a settlement in *Bowness*.

Scarlett and *G. Lamb*, in support of the order of sessions, argued that this purchase of the lots of oats was to be deemed a tenement within the statute of *Car. 2.*, for it passed an interest in the land to the purchaser; and though it be a purchase and not a renting, that makes no difference as to the settlement. First, An interest in the land passed to the vendee for so long as the oats should be growing, and until they were

were reaped and carried away. The vendee was bound to carry them off in convenient time (a), and for that purpose had a right of entry upon the land, and might have distrained damage feasant, or maintained trespass. For thus, *Crosby v. Wadsworth* (b), an agreement for the purchase of a crop of mowing grass, then growing, will enable the vendee to maintain trespass *quare claus. freg.*, for an agreement conferring an exclusive right to the vesture of land, during a limited time, and for given purposes, is a contract or sale of an interest in lands. In like manner of a sale of a crop of growing turnips (c); and the distinction taken in *Parker v. Staniland* (d) that the crop was not a growing crop recognizes the same principle. So a rabbit warren without any right in the soil (e), the feeding of cows upon land (f), the aftermath of meadow land (g), are, each of them, such an interest in the realty as will confer a settlement; and the rule seems to be that any thing is a tenement which is a profit out of land; it need not be a fee-simple or fee-tail, any minute interest in land is parcel of a tenement (h). Secondly, A tenement acquired by purchase will confer a settlement as well as one that is acquired by renting, for the words of the statute 13 & 14 Car. 2. c. 12. are "shall come to settle in," not shall rent, a tenement, so that if there be possession under a lawful title, the words of the statute are as well satisfied as if that title were by renting. And what substantial difference is there between the

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(a) Per Hutton J., *Moor*, 882.

(b) 6 East, 602.

(c) *Emmerson v. Heelis*, 2 Taunt. 38.

(d) 11 East, 362.

(e) *Rex v. Piddletrentbide*, 3 T. R. 772.(f) *Ibid.* and *Rex v. Tolpuddle*, 4 T. R. 671.(g) *Rex v. Stoke*, 2 T. R. 451. *Rex v. Brampton*, 4 T. R. 348.(h) Per Lord Kenyon, *Rex v. Tolpuddle*.

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renting and the purchase of a term, except that in one case the rent is included in the purchase-money, and paid in advance, in the other it is paid by degrees? Or if, as has been sometimes said, the ability of the tenant to pay, or his credit to acquire, be the criterion, is not the trust as great which is reposed in a vendee, and his competence as well ascertained by his purchasing as if he rented the land? For suppose a renting with a stipulation that the tenant shall pay the rent in advance; surely he has no greater degree of credit, than a vendee who pays the money presently, or rather the stipulation that he shall pay in advance, betrays a want of credit in him, because it is out of the ordinary course; yet this would not prevent his gaining a settlement, for it is not necessary for the purpose of a settlement that any rent at all should be paid (*a*). Therefore, whether the tenement be rented or purchased, there is the same reason for its conferring a settlement in one case as in the other, and the words of the statute are as well satisfied.

LORD ELLENBOROUGH C. J. We need not trouble the other side. I own it appears to me that it has been uniformly adopted as the rule for construing the statute of *Car. 2.*, as much as if the word itself had been inserted in the statute, that the *coming to settle in* means by *renting* or holding in the character of tenant. It is true this word *renting* is not in the statute, but what is found in the subsequent stat. 9 & 10 *W. 3. c. 11.* shews pretty well how the statute of *Car. 2.* was understood. For the subsequent statute enacts "that no person who

(*a*) See *Rex v. Fillingley*, 1 T. R. 458.

shall

shall come into a parish by certificate shall gain a settlement therein, unless he shall take a *lease* of a tenement of the value of 10*l.*, &c.” Therefore certainly this enactment was framed upon an understanding that the *coming to settle* in the statute of *Car. 2.* meant a taking under a letting or renting. Upon a subject like this, one is afraid to enlarge, lest what may be said should lay the foundation of future discussions. What has been said already upon the subject, has, according to my understanding of it, reached the extreme limits of common sense. It is therefore sufficient to say upon the present occasion that this was a purchase and not a renting, or in any way a holding as tenant, and upon that construction this person did not gain a settlement. I feel no inclination to extend the decisions upon this subject, indeed I hardly go with them to the extent that they have gone already, and think it much better in this case to abide by the statute.

LA BLANC J. There is one objection to which no answer has been given. It is admitted that the party must have come to settle in a tenement, that is, must have resided in the parish, while he held a tenement of the value of 10*l.*, for 40 days. Now in this instance, allowing all that has been stated as the law to be correct, and the authorities to apply, and granting that this was a tenement, how can we say that this person has resided 40 days in the parish, while he held a tenement of the value required? He rented the dwelling-house and other premises of the annual value of 4*l.* for the whole year, and he bought a crop of oats by auction on the 12th of *August*, which he began to cut on the 14th of *September*, and it does not appear but that he
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carried the greater part in value of the crop, before the expiration of 40 days from the time of his first purchasing it, and if that were so, his interest would have ceased pro tanto within the 40 days, and he would not have held a tenement for that time of the annual value of 10*l*. Therefore, on the ground that it does not appear that there has been a holding for 40 days of a tenement of the value of 10*l*. a-year, I think that the order of sessions cannot be supported.

BAYLEY J. It must appear that the party had an interest in land of the annual value of 10*l*. for 40 days, but here his interest diminished in value de die in diem as he cleared the land, and it is consistent with this statement, that before 40 days from the 12th of *August* he had cleared so much as would reduce the tenement below the yearly value of 10*l*.

Per Curiam,

Order of Sessions quashed.

P. Courtney was to have argued against the order.

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The KING against HAYNES.

Indictment
against a miller,
charging in the
same count
that he received
two separate
parcels of bar-
ley, each of four

bushels, to be ground at his mill, and that he delivered three bushels 46 lb. of oatmeal and barley meal mixed, other and different than the produce of the said four bushels, is ill for the uncertainty to which of the four bushels it relates. The indictment is also ill if it do not shew a certain place where the defendant received the barley to grind.

Indictment does not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal different from the produce of the barley, and which is musty and unwholesome.

ERROR to reverse a judgment of fine and imprisonment given by the justices of *Kent*, at their quarter sessions, upon an indictment there found and tried. The indictment was in this form :

“ The

“ The jurors, &c. present that *F. Haynes*, late of the parish of *Brasted*, in the county of *Kent*, miller, on the 5th of *March* in the 54th G. 3., and long before, and continually from thence until the day of taking the inquisition, was possessed of and did keep, and still is possessed of, and doth keep a certain common and public mill, called a water-mill, situate at the parish aforesaid, for the purpose of grinding wheat and other corn therein, and during all the time aforesaid, caused to be ground divers large quantities of wheat and other corn belonging to divers subjects, in the said mill, in consideration of certain hire or reward to be taken by him from the said subjects, to wit, at the parish aforesaid, and that the defendant, on the said 5th of *March*, did receive of and from *E. N.*, a subject, four bushels of good sound and wholesome barley of the goods of *E. N.*, of the value of 20s., to be ground at and in the said mill, for certain reasonable hire or reward to be taken by the defendant from *E. N.* for grinding the same at and in the said mill, by reason whereof the defendant ought to have delivered to *E. N.* all the true and proper meal which the said four bushels of barley should yield after grinding the same as aforesaid; and the jurors aforesaid, upon their oath aforesaid, do further present that the defendant, on the day and year last aforesaid, at *Brasted* aforesaid, in the county aforesaid, and long before, &c. (repeating verbatim as before that the defendant kept a mill, &c. and received of *E. N.* four bushels of barley to be ground, &c.); and the jurors aforesaid, upon their oath aforesaid, do further present that the defendant unlawfully, falsely, fraudulently, and deceitfully contriving and intending to cheat and defraud *E. N.* of his goods, afterwards, to wit, on the 7th of *March* in the 54th year aforesaid, with force and

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arms, at, &c. unlawfully, unjustly, fraudulently, and deceitfully did deliver unto the said *E. N.* a certain quantity of meal, to wit, three bushels 46lb. of oatmeal and barley meal mixed, other and different than the true and proper meal or produce of the said four bushels of barley so received by him the defendant of and from the said *E. N.* as aforesaid, to be ground by him the defendant as aforesaid, and then and there, to wit, on the same day and year last aforesaid, at, &c. did unlawfully, falsely, fraudulently, and deceitfully pretend and intimate to the said *E. N.* that the said quantity of meal so delivered by him the defendant to the said *E. N.* was good, sound, and wholesome meal, produced and yielded from the said four bushels of barley so received by him the defendant for the purpose in that behalf aforesaid, whereas in truth and in fact the said quantity of meal so delivered by the defendant to the said *E. N.* as aforesaid was not the produce or quality of the said barley so received by him the defendant of the said *E. N.* for the purpose in that behalf aforesaid, and whereas in truth and in fact the said quantity of meal so delivered by the defendant to the said *E. N.* as aforesaid, at the time of such delivery of the same, was and still is a compound and mixture of oatmeal and barley meal, yielded and produced from oats and barley, and whereas in truth and in fact the said quantity of meal so delivered by the defendant to the said *E. N.* as aforesaid, at the time of such delivery of the same, was and still is musty, sour, damaged, and unwholesome, and therefore of little or no use, or value, to the said *E. N.*; and whereas in truth and in fact he the said defendant hath not in any other manner whatsoever hitherto accounted with the said *E. N.* for the

said four bushels of barley, or made or given him any other satisfaction for the same, to the great damage, impoverishment, injury, and deception of the said *E. N.*, to the evil example, &c. and against the peace, &c.

Plea not guilty, and verdict of guilty.

And the errors assigned were, first, that it appears by the indictment that two several deliveries of two several parcels of barley were made on the said 5th of *March* by *E. N.* to the defendant, and it does not appear in which of the two parcels the supposed fraud was committed by the defendant; secondly, that no indictable offence is charged upon the defendant; thirdly, that no sufficient venue is laid where either of the said parcels of barley was received from *E. N.* by the defendant.

Joinder in error.

Taddy in support of the errors, argued, first, that the indictment was ill for uncertainty, by reason that it is not shewn to which of the two parcels of barley alleged to have been received by the defendant the fraud applies; and the whole is one finding, and is to be taken as one count, and no part of it can be rejected. And how upon such a finding could the defendant plead *autrefois* convict or acquit, and shew that it was in respect of the same identical act of receiving, where more than one act of receiving is alleged? Secondly, He relied on *Rex v. Channel* (a), *Rex v. Wheatley* (b), *Rex v. Wilders* (c), to shew that this was not an indictable offence, but a matter of a private nature for which an action would lie. And as to its being indictable in the same manner as the selling unwholesome pro-

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(a) *Str.* 793.

(b) 2 *Burr.* 1125.

(c) Cited 2 *Burr.* 1128.

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visions is indictable (a), the indictment ought to have alleged, as in *Treove's case* (b), that the defendant delivered it *to be eaten as food*, and that it was *not fit to be eaten by man*, whereas all that is alleged is that *it was a mixture of oat and barley meal, and was musty, sour, damaged, and unwholesome*. Thirdly, The indictment is ill, because it only charges that the defendant on a day certain received four bushels of barley, &c. without shewing that he received them at a certain place. For the receipt of the thing is a material fact in this case, and it is an undoubted principle that no indictment can be good without precisely shewing a certain time and place of the material facts alleged in it; and no defect of this kind can be helped by the verdict. (c)

Bolland, contra, as to the objection upon the want of venue, argued that if it were material, here is a venue; for the second part of the indictment, which respects the receipt of the second parcel of barley, commences with an allegation of time and place, viz. *on the day and year last aforesaid, at Brasted aforesaid*, to which all that follows it is to be referred. But the indictment would be well enough without it, for the fact of receiving the barley does not require a venue, because the receipt is not the gist of the offence, and therefore it is immaterial where he received it; the delivery of an unwholesome mixture other than the produce of the barley is the offence, which is laid with the proper certainty of time and place. And as to the second objection, it is laid down in *Hawk. P. C. b. 1. c. 71. sect. 1.* for which 1 Sess. Ca. 217.

(a) 4 Blac. Com. 162.

(b) 2 East, P. C. 821.

(c) Hawk. P. C. b. 2. c. 25. sects. 77. 83.

is cited, that “changing corn by a miller and returning bad corn instead of it, is punishable by indictment, for being in the way of trade it is deemed an offence against the public.” And the authorities cited for the defendant as well as *Rex v. Bower* (a), only decide that for an imposition which a man’s own prudence ought to guard him against, an indictment does not lie, but he is left to his civil remedy. And in the case at bar if the defendant had sold to E. N. unsound barley for sound, these authorities might have applied; but here the defendant has fraudulently changed another man’s good commodity, which he received for a special purpose, for his own bad commodity. Therefore the rule, *caveat emptor*, to which the former cases may be referred, does not apply to this. As to the first objection, the indictment may be read as commencing where the second part which respects the receipt of the second parcel begins, and then there will be one good count.

LORD ELLENBOROUGH C. J. As to the 1st error assigned, this indictment has gone a certain length, that is, as far as alleging a delivery of one parcel of barley, and then breaks off and alleges the delivery of a second parcel, leaving the matter of the first allegation imperfect, and the whole uncertain as to which of the two deliveries the fraud imputed to the defendant applies. One cannot but perceive that the first part is but the fragment of a count, and ought to have been perfected by alleging some act done applicable to that delivery, and then the other breach would have applied to the second delivery. That however has been omitted, and therefore as it now stands upon the face of the record

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there were two deliveries of several portions of barley, and it is uncertain to which of the portions the offence is to be applied. Therefore upon this ground the indictment seems to be vicious. Then as to the want of a venue where either of the parcels of barley was received, which is the last error assigned, I have been endeavouring to see if it might not be dispensed with, but upon looking to the indictment, I find that it alleges that the defendant received the barley, for the purpose of being ground at the mill, and that the purpose is a fact constantly referred to in all the subsequent allegations; for they all relate to the barley *so received by the defendant as aforesaid*. Therefore it seems to me that the indictment is defective for want of a venue to a fact which is material and may not be dispensed with. Also the allegation that the quantity delivered to *E. N.* was musty and unwholesome, if it had alleged that he delivered it as an article for the food of man, might possibly have sustained the indictment, but I cannot say that its being musty and unwholesome necessarily and *ex vi termini* imports that it was for the food of man, and it is not stated that it was to be used for the sustenance of man, only that it was a mixture of oat and barley meal. As to the other point that this is not an indictable offence because it respects a matter transacted in the course of trade, and where no tokens were exhibited by which the party acquired any greater degree of credit, if the case had been that this miller was owner of a soke mill, to which the inhabitants of the vicinage were bound to resort in order to get their corn ground, and that the miller abusing the confidence of this his situation had made it a colour for practising a fraud, this might have presented a different aspect; but as it

now

now is, it does seem to be no more than the case of a common tradesman who is guilty of a fraud in a matter of trade or dealing, such as is adverted to in *Rex v. Wheatley* and the other cases, as not being indictable. These objections therefore, and one is sufficient, seem to me to be fatal.

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LE BLANC J. I am of the same opinion. It has been attempted to answer the objection for want of a venue in this way, that as it is alleged that the Defendant received the barley to be ground at the mill, and the mill is before described as situate at a parish, therefore there is a venue where the barley was received. But it is a material fact and necessary to constitute the offence, supposing it to be indictable, that the defendant received the barley for the purpose of being ground into meal, and therefore ought to be alleged with sufficient certainty of time and place, and not left to inference; but here is no sufficient allegation of the place where the defendant received it. Then as to the objection that here are two several receipts alleged, the Court, I think, cannot consider the first part of the indictment touching the receipt of the first four bushels, as a distinct count, because it is not followed up by any charge, but merely states the receipt, nor has it any conclusion, against the peace, &c. The whole forms but one count containing two introductions to one grievance only, for the introductory words "And the jurors aforesaid," &c. do not necessarily indicate a new count, but are frequently used to introduce farther matter in the same count. It seems to me therefore that this must be considered as one count; and the Court cannot reject any thing, but as it stands the prosecutor might have proved two several receipts by the defendant.

Per Curiam,

Judgment reversed.

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May 31st.***The KING against WELBANK and Others.**

The trustees under the will of a person seised in fee of two-third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals, under the moors, commons, or wastes of the manor, at a rent certain, are not rateable to the relief of the poor for such rent; and therefore a rate by which they were rated in one gross sum for such rent, and also in respect of their being owners and occupiers of the moors, commons, and wastes within the manor, was held ill.

UPON appeal against a poor's rate for the township of *Arkengarthdale*, in the North Riding of *Yorkshire*, by the defendants, as trustees under the will of *G. Browne*, the Sessions confirmed the rate, subject to the following case:

G. Browne was the purchaser, and was seised in fee of two-third parts of the manor of *Arkengarthdale*, which two-third parts were subject to certain leases, theretofore granted to a company of mine adventurers, of the mines, veins, pipes, floats, strings, and parcels of lead, tin, and copper ore, and other minerals and fossils found or to be found in, within, upon, or under the moors, commons, or wastes within the manor, with full liberty to search for, dig, &c. and carry away the same, and to erect machinery and other buildings upon the moors, commons, and wastes then uninclosed, for the better working the said mines, at rents amounting to 2600*l.* per annum, for a part of the terms thereof granted, and 2400*l.* for the residue of such terms, besides a sum of 2200*l.* to be paid by the lessees in 1820, in manner therein mentioned, with covenants by the lessees for payment by them of all manner of taxes, rates, assessments, and impositions whatsoever, which should be assessed or imposed in respect of the said two-third parts of the said mines and minerals, or in respect of the annual rents, and the said sum of 2200*l.*, or upon the lessor, his heirs or assigns, or upon the lessees, their executors, administrators, or assigns. *G. Browne* being thus seised of the said two-thirds of the manor, moors, com-

commons, and wastes of *Arkengarthdale*, in 1811 devised the same to the defendants, as trustees, upon certain trusts. There is a house in the parish of *Arkengarthdale*, called *Scarr-house*, which belongs to the lords in fee, and which was licensed and kept by the gamekeeper as a public-house, at the time *Browne* purchased the two-thirds, and so continued for about two years afterwards, during which time the gamekeeper and his family slept in the east part of it, having the whole house to go over, and the care of it, and occasionally using the dining-room and the three bed-chambers at the west end. The dining-room and two rooms up stairs were furnished by the lords, and the furniture remained their own property. In 1812 the house was discontinued as a public-house, and *Browne* furnished two of the three best bed-rooms at the west end of the house, and frequently went into *Arkengarthdale* and lived at *Scarr-house* for a fortnight and three weeks together, during the shooting season, and at other times. His provisions were provided by the gamekeeper, for which he paid when he went away, and he always kept his own wine at *Scarr-house*, but he was not there the last year. The parochial and assessed taxes for *Scarr-house* were paid by him and the owner of the other third part of the manor, according to their proportions, viz. two-thirds by *Browne* and one-third by the other owner. They also paid the gamekeeper his yearly wages, and let him live in the house. The mines are under the surface of the moors and the uninclosed parts of the manor. The lords have the sole right of soil and shooting upon the moors; which they do not let, but keep for the purpose of shooting over themselves; but the pasturage or herbage is enjoyed by the tenants and

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occupiers of lands in *Arkengarthdale* having right of common thereon. The lessees are not rated to the relief of the poor in respect of the said lead mines. The defendants were rated thus: The trustees under the will of *G. Browne* for 2000*l.* annual rent paid by the *Arkengarthdale* and *Derwent* mine company for and in respect of two-thirds of the *Arkengarthdale* lead mines, and for other minerals, and fossils (except coal), within the parish of *Arkengarthdale*, and also in respect of their being owners, proprietors, and occupiers, of the moors, commons, and wastes within the manor of *Arkengarthdale*. — Amount 2000*l.*, assessment 150*l.* (being 1*s.* 6*d.* in the pound.)

J. Williams, in support of the order of Sessions, compared this case to the case of tolls, in which it had been adjudged that though the tolls per se were not rateable, yet if they be annexed to something corporeal, such as a sluice or bridge, &c. which is rateable, the occupiers of such bridge or sluice, &c. shall be rated in respect of the tolls. And for this he cited *Rex v. Cardington* (a), *Rex v. Mayor of London* (b), *Rex v. Leeds and Liverpool Canal* (c), *Rex v. Nicholson* (d), *Williams v. Jones* (e). In like manner though mines, quâ mines, are not rateable, yet if the profits derived from them be annexed to the realty, the occupiers of the realty shall be rated in respect of them. Now here the trustees are rated as occupiers of the moors, commons, and wastes under which the mines, in respect of the profits of which they are assessed, lie, so that they have a corporeal visible property within the parish, the value of

(a) *Cowp.* 581.

(b) 4 *T. R.* 21.

(c) 5 *East*, 325.

(d) 12 *East*, 330.

(e) *Id.* 346.

which

which is enhanced by the annexation of these profits. And whenever that is the case, the principal thing shall be rated according to its value, as it is increased by the thing appendant to it, although the latter would not of itself be the subject of rate. And this is not like *Rex v. Bishop of Rochester (a)*, for that was a rate upon the trustees in respect of a rent apart from the occupancy of any thing whatever; wherefore it was well said in that case that if the trustees were rateable, every landlord might, by the same rule, be rated for his rent. Not so in the present, for the trustees have the sole right of soil and shooting upon the moors, which they do not let, but keep in their own hands, and which is almost the only occupation that so wild a tract of country is capable of. 2dly, The trustees may be considered rateable as inhabitants, being the trustees under the will of a person who clearly would have come within that description, for he occupied the *Scarr-house* either himself or by his servants.

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LORD ELLENBOROUGH C.J. As to what has been last thrown out, the actual inhabitancy of the testator does not devolve upon his executors or trustees. Then this rate appears to be ill on this single ground, that it is a conjoint rate in respect of two things, one of which is not rateable. The rent is clearly not the subject of rate, the other may or may not be. But it cannot be good as a conjoint rate.

LE BLANC J. If the facts bore out the argument it might be well. If these trustees had been rated in a

(c) 12 East, 353.

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large sum in respect of their being the owners and occupiers of the moors, commons, and wastes, equal to the profits they derive from the mines, perhaps the Court might have said we will not enter into the question of proportion; but here the rate is imposed in respect of two distinct properties; namely, the rent, and the surface of the land.

Order of Sessions quashed.

Hullock was to have argued on the other side.

Wednesday,
May 31st.

CLARIDGE against DALTON.

The drawer of a bill of exchange, who has no effects in the hands of the drawee, except that he has supplied him with goods upon credit, which credit does not expire until long after the bill would become due, is not discharged by want of notice of the dishonour.

Time given by an indorsee to the payee does not discharge the drawer.

ASSUMPSIT upon a bill of exchange, dated 29th of June 1814, for 300*l.* drawn by the defendant on *T. Pickford*, payable two months after date to *Quarton*, or order, and indorsed by *Quarton*, and by several mesne indorsements to the plaintiff: plea, non assumpsit.

At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Hilary* term, one point was, whether the defendant was entitled to notice of non-payment; as to which the facts were these:

The defendant was a tradesman in the country, *Pickford*, the drawee, a tradesman in *London*, and there had been an intercourse of some years between them in the way of their trades, the defendant supplying *Pickford* with goods, and *Pickford* giving his acceptances in payment at the end of each year. At the time this bill was drawn nothing was due from *Pickford* to the defendant, but the defendant had received from him an unlimited order for the supply of goods, under which he had furnished

Pickford with about 200*l.* worth of goods, and at the time when the bill became due with about 70*l.* worth more, but for these *Pickford*, according to the usual course of dealing between them, was not liable to be called upon to give his acceptance until the end of the year. The bill was dishonored when presented to *Pickford* for payment, of which notice was not given to the defendant in due time. And it was objected, upon the authority of *Thackray v. Blakett* (a), that the defendant was entitled to notice.

Another point was, whether the defendant was discharged by *Britain* and Co. having given time to *Quarton*, the payee, as to which the facts were these: *Britain* and Co. were bankers at *Ripon*, and indorsed the bill to *Hutton* and Co., who indorsed it to the plaintiff for valuable consideration. Upon the bill's being dishonored, the plaintiff returned it to *Hutton* and Co., and *Hutton* and Co., about the 13th of September, sent it to *Britain* and Co., who refused to take to it, on account of its being sent to them out of time, but received the bill at the desire of *Hutton* and Co. for the purpose of obtaining payment for them. Accordingly, on the 9th of September, *Britain* and Co. wrote to the defendant, informing him the bill was returned to them, and requesting payment of the bill and expences. On the 17th they wrote to *Quarton* the following letter: " Sir, we have your favour of yesterday, and are sorry it is not in your power to take up the dishonored bill: the time you wished us to hold it is extremely inconvenient to us: however, rather than proceed to extremities, we have requested Mr. F. to wait on you, to whom if you cannot pay in banker's paper

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(a) 3 *Campb. N. P. C.* 164.

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you will give your draft upon *London* at 10 days, payable to some friend of yours; if you cannot conveniently trouble a friend, we will take it payable to your own order. Signed *Britain and Co.*" *Quarton* accordingly gave a bill on another person for 300*l.*, which was dishonored, and paid 2*l.* 10*s.* 11*d.* interest and expences. The clerk of *Britain and Co.*, who was a witness for the defendant, said, that if the second bill had been paid, *Britain and Co.* would have delivered up the bill in question; and that they considered themselves as the agents of the plaintiff. There was a verdict for the plaintiff, his Lordship reserving the point upon the notice. Accordingly a rule nisi was obtained in the last term for entering a nonsuit upon that point; but the other point was also mentioned.

And now the report having been read, *Park* and *Nolan* were called upon to support the rule, and they argued, 1st, that the defendant ought to have had notice of the dishonor; for here he had effects in the drawee's hands both at the time of drawing the bill and when it was refused payment, and there were mutual dealings between them. Therefore this was not a mere drawing upon accommodation, nor was the drawee an entire stranger, or the drawer wholly unwarranted in expecting that it might be honored, for the drawee might have paid it and set it off in his account. And where a drawer has *any* effects, no matter to what amount, in the drawee's hands at the time of the drawing, though he has none when the bill is dishonored (*a*); or where it may turn out only upon a future settlement

(a) *Orr v. Magianis*, 7 *East*, 359.

of accounts between the parties that he has no effects (*a*); or where there is a running account with the drawee and a fluctuating balance between them (*b*); or a *bonâ fide* expectation of assets (*c*); or where he has no assets at the time of drawing, but has assets before the bill becomes due (*d*); in all these cases notice is necessary. And it has frequently been a subject of regret to the Court, that the rule in *Bickerdike v. Bollman* (*e*) dispensing with notice, was ever laid down, and as frequently said that it ought not to be extended (*f*). It makes no difference that this defendant could not have withdrawn his effects out of the drawee's hands, for this is not the only object of requiring notice; and if he could not withdraw his goods, at least notice would have enabled him to choose whether he would not desist to furnish more. 2dly, The defendant is discharged by the indulgence given to *Quarton* by *Britain* and Co.; for if *Britain* and Co. were agents of the plaintiff, then it was the plaintiff's own act; but admitting that they were not, yet if they being holders of the bill once discharged the defendant, his responsibility cannot be revived by shifting the bill into the plaintiff's hands. (*g*)

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LORD ELLENBOROUGH C. J. The Court think that there is not any occasion to trouble the other side. I accede to the proposition that where there are any funds in the hands of the drawee, so that the drawer has a right to expect, or even where there are not any funds,

(*a*) Per *Le Blanc J.*, *Legge v. Thorpe*, 12 *East*, 177.

(*b*) Per Lord *Ellenborough C. J.*, *Brown v. Maffey*, 15 *East*, 221.

(*c*) *Rucker v. Hiller*, 16 *East*, 43.

(*d*) *Thackray v. Blackett*, 3 *Campb. N. P. C.* 164.

(*e*) 1 *T. R.* 405. (*f*) See cases *supra*.

(*g*) *Roscow v. Hardy*, 12 *East*, 434.

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if the bill be drawn under such circumstances as may induce the drawer to entertain a reasonable expectation, that the bill will be accepted and paid, the person so drawing it, is entitled to notice. The question therefore is, whether in this instance there were any funds in hand at the time of drawing applicable to this bill, or a ground of reasonable expectation that when the bill became due the drawee would come forward and pay it. As to funds, though there were goods of the defendant in the drawee's hands at the time of the drawing, yet they were not such as could be properly set against the drawing. And as to any reasonable expectation that the bill would be paid, it was neither accepted, nor had the defendant any claim upon the drawee to have it honored, according to the due course of credit between them, until the end of the year. At that time he would have been entitled to draw, whereas this bill, which is at two months, became due on the 1st of *September*; it was drawn therefore in anticipation of his credit, and without any assurance of accommodation. For if there never was any drawing between the parties but at the end of the year, or accepting of bills, how shall we say that the defendant was authorized to entertain a reasonable expectation that this bill would be honored? And if not, this falls within the rule laid down in *Bickerdike v. Bollman*, and notice was not necessary. Then taking it that the defendant is not entitled to notice, we come to the second objection, in respect of which I cannot find that the plaintiff ever authorized *Britain and Co.* to give time of payment, so as to connect him with that act; the bill was indorsed to *Britain and Co.* as to any other indorsees, and without a special authority from the plaintiff I cannot see how they could vary his rights.

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LE BLANC J. Every new case makes one regret that the rule in *Bickerdike v. Bollman* for dispensing with notice was ever introduced: but while that rule remains we must act on it. And the only question here is, how far this case ranges itself within the cases cited, or within *Bickerdike v. Bollman*. I perfectly agree that it is not necessary that the drawer should have effects or money in the hands of the drawee, either at the time when the bill is drawn, or when it becomes due. For if the bill be drawn in the fair and reasonable expectation that in the ordinary course of mercantile transactions it will be accepted or paid when due, the case does not range itself under that class of cases of which *Bickerdike v. Bollman* is the first. But here the defendant did not draw the bill with any reasonable expectation that it would be accepted or paid, but on the contrary with a pretty clear assurance that it would be dishonored. For the bill was not drawn in the ordinary course of business, so as to justify an expectation that it would be paid; and therefore the necessity of giving notice was dispensed with. Upon the other point, the act of *Britain and Co.* must either be considered as the act of the plaintiff, or as not capable of affecting the plaintiff's rights. Now there is not any evidence that it was his act; but if there were, giving time to the payee did not discharge the drawer.

BAYLEY J. I am entirely of the same opinion. The case of *Bickerdike v. Bollman* has established, and I am disposed to think rightly, that a party who cannot be prejudiced by want of notice, shall not be entitled to require it. But this rule extends only to cases where the party has no effects, or is not likely to have effects,
or

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or has no expectation that he will have any. In all other cases the drawer is entitled to notice, and this is required in order that he may withdraw forthwith out of the hands of the drawee such effects as he may happen to have, or may stop those which he is in a course of putting into his hands. Now here *Dalton*, as between himself and *Pickford*, could not but conclude that *Pickford* would not pay the bill when due, and that he was drawing upon him without any reason to expect that he would, unless he remitted to him funds for the purpose; because he knew that he had no right to draw upon him before the end of the year, and long before that he has notice. At the period when the bill was refused payment, *Dalton* was not in a condition to have taken any steps against *Pickford* so as to derive any benefit from a notice. Therefore it seems to me that this case ranges itself under the authority and within the reason of *Bickerdike v. Bellman*, and so the defendant is not entitled to notice. Then as to the second point, whether the defendant is discharged by the indulgence given to *Quarton*, the case of *English v. Darley* (a) established that if the holder agree to give indulgence for a certain period of time to any one of the parties to a bill, this takes away his right to call on that party for payment before the period expires, and not only to call upon him but upon all the intermediate parties, for otherwise if he were to oblige them to pay the bill, they would immediately resort against the very person whom the holder has indulged, which would be inconsistent with his agreement. Therefore if he give time to the payee, he cannot call on the indorsers. But this rule does not

(a) 2 Bos. & Pull. 61.

apply

apply to a party lower down on the bill; as if the 5th indorsee were to give time to the last indorser for six months, proposing in the mean while to endeavour to get payment from the indorsers lower down on the bill, this might well be done; yet according to the argument for the defendant all the prior indorsers would be discharged by the indulgence given to a subsequent indorser.

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DAMPIER J. I can add nothing to what has been said. I am perfectly of the same opinion.

Rule discharged.

Topping was for the plaintiff.

ECCLES and Another *against* HOLLAND and
Three Others. (a)

Thursday,
June 1st.

IN assumpsit for goods sold and delivered against four defendants, the proceedings being by original and on bailable process in *London*, three of them appeared and put in bail by one attorney, and the fourth separately by another, and the three defendants also pleaded separately from the fourth. In last term, on the application and usual undertaking of the three defendants, the venue was changed from *London* into the county palatine of *Lancaster*.

When in proceedings by original against four, the venue is changed into a county palatine on the application of three of the defendants, who appear separately by one attorney, and undertake not to assign the want of an original for error, the Court will require a similar undertaking from the fourth, who has appeared by a different attorney.

On the first day of this term *Spankie* obtained a rule nisi for setting aside the rule for changing the venue,

(a) This note was communicated to us by a gentleman at the bar.

on

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on the ground that the venue could not be changed upon the application of *some* of the defendants (*a*), at least not into a county palatine, without the undertaking of the other defendant not to assign the want of an original for error, particularly when they appeared by different attornies and severed in pleading.

Gaselee, who on a former day shewed cause on behalf of the three defendants, stated that the other defendant was willing to enter into the undertaking required; and *Richardson* was now instructed to that effect on the part of the fourth defendant: whereupon the rule obtained by *Spankie* was discharged, upon payment by the defendants who had obtained the original rule for changing the venue, of the costs of this application.

(*a*) As to changing the venue on the application of *some* of the defendants, see *Box v. Reed*, *Practical Regist.* C. P. 430.

Friday,
June 2d.

TRUEMAN *against* LAMBERT and Others.

Upon a petition to the House of Commons against the return of a member, and also charging the returning-officer with corruption and bribery, if the returning-officer attend by his counsel and agent before the select committee, and bring witnesses to defend himself against those charges, and the committee report that the charges appeared to them frivolous and vexatious, which resolution is entered in the journals, and the returning-officer obtain the Speaker's order and certificate, pursuant to stat. 28 G. 3, c. 52., ascertaining the amount of his costs and expences, debt lies to recover them.

DEBT for 24*l.* 2*s.* 1*d.*, due from the defendant to the plaintiff by virtue of stat. 28 G. 3. c. 52. s. 23. Plea, nil debet. At the *Middlesex* sittings after *Hilary* term 1814, there was a verdict for the plaintiff, subject to the opinion of the Court upon a case, which in substance was this:

At the last election for a burgess to serve in parlia-

ment

ment for the borough of *Pontefract*, there were three candidates, and Lord *Pollington*, one of them, was returned; against which return the defendants, as electors of the borough, signed and presented a petition to the House of Commons, charging the plaintiff, then mayor and returning-officer of the borough, with partiality and corruption in favour of Lord *P.*, and with having bribed several of the electors to vote for him, and charging also Lord *P.* by himself and agents with bribing and treating, and that the return was obtained by these and other illegal practices. The defendants did not serve a copy of this petition, or of the order of the House for taking it into consideration, upon the plaintiff, but upon the agent of Lord *P.*, who immediately shewed it to the plaintiff, and received instructions from him to oppose the same on his behalf before the committee. Notices were sent to the parties, and an order to appear by themselves, their counsel or agents, when the petition was ordered to be taken into consideration. The agent for the plaintiff's solicitor in the country, who was also the agent of Lord *P.*, attended the striking of the committee, but did not retain any counsel for the plaintiff on that occasion. The plaintiff attended the committee by his counsel and agent, when the petition was taken into consideration, and incurred great expence in bringing witnesses to defend himself against the charges made in the petition, but the trial of the petition went off upon the ground that the defendants did not produce the original poll-books; and the chairman of the committee reported to the House, that Lord *P.* was duly elected, and that the petition did not appear frivolous as it applied to him, but that the charges contained in the petition against the plaintiff did appear
fri-

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frivolous and vexatious; which resolution was entered in the journals of the House. The plaintiff made application to the Speaker pursuant to the act (a), in order to obtain his costs and expences, and the Speaker directed the same to be taxed by the clerk-assistant of the House, and a master in Chancery, who examined the same and reported to him the amount, and he thereupon signed a certificate, expressing the amount of the costs and expences, as allowed in the report, to be 24*l.* 2*s.* 1*d.* The plaintiff demanded the said costs of the defendants, which they refused to pay.

The question was, whether the plaintiff was entitled to maintain this action under the statutes relating to the trials of controverted elections, &c. particularly the statutes 10 G. 3. c. 16. 11 G. 3. c. 42. 25 G. 3. c. 84. 28 G. 3. c. 52. If the Court should be of opinion that the plaintiff is entitled, the verdict to stand; otherwise, a nonsuit.

Nolan for the plaintiff, contended that he was entitled, as being a party who appeared before the committee in opposition to the petition, within the meaning of the stat. 28 G. 3. c. 52. s. 19., although he was not served with a copy of the petition or of the order of the House for taking it into consideration, nor attended as a party to strike the committee. And he said that the select committee were the proper and exclusive forum for determining this question, and that they had determined it; for when they reported to the House that the petition, as it regards the plaintiff, appeared to them frivolous, that necessarily implied that the plaintiff was

(a) 28 G. 3. c. 52.

a party before them ; and then by s. 19. the costs follow upon such report. And s. 23., which gives this action for the recovery of the costs, points out what shall be deemed full and sufficient evidence in support of it, viz. the certificate of the Speaker, together with an examined copy of the entry in the journals of the resolution of the committee ; plainly treating the resolution of the committee, like the judgment of a court, as final, and the certificate as a taxation of costs. And even if the resolution of the committee were not final, but the question was now open, whether the plaintiff was a party or not before the committee, it would be strange to hold that the returning officer, who is charged with such misconduct as, if substantiated, would lead to his imprisonment, if he appear to defend himself against such charge, is nevertheless to be deemed so much a stranger as not to be within the meaning of the words *a party who shall have appeared before the committee in opposition to such petition.*

C. F. Williams, contra, argued that the plaintiff was not a party so as to be entitled to costs under the 28 G. 3. c. 52. For all the statutes relating to this subject, being in *pari materiâ*, are to be taken as if they were one law, and shall serve to expound each other ; and therefore if the plaintiff would not have been a party within the meaning of any of the prior acts, neither shall he be within this. Now the stat. 10 G. 3. c. 16. only accounts those parties who are the petitioners, and sitting members ; which is extended by the 11 G. 3. c. 42. to the several parties who, on distinct interests or grounds of complaint, shall present separate petitions, and by s. 6. each of them shall strike the committee. Then the

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25 G. 3. c. 84. s. 10. makes the returning officer, in certain cases, a party. But the present case falls within neither of those acts, and consequently not within the 28 G. 3. c. 52. For that statute is confined to such cases as are within the former acts, as appears by the preamble, which recites the former acts, and that it is expedient that provision should be made for discouraging persons from presenting frivolous or vexatious petitions, &c. *in any of the cases to which the above-recited acts relate.* Therefore whatever might be the construction of s. 19. of this last act, if it stood by itself, it is plain that, coupled with the prior acts, the words *party or parties* must be understood of such party or parties only to whom the prior acts relate. Accordingly the practice has been not to consider a returning officer, whose conduct is complained of in the petition, as a party that is entitled to be admitted to strike the committee. (a)

Lord ELLENBOROUGH C. J. Very likely for the purpose of striking the list of the committee he may not be a distinct party. But here the committee have reported that the petition, as it regards this plaintiff, who appeared before them to oppose the charges made in the petition, appeared to them to be frivolous; and upon this subject they are a court not only of competent but of exclusive jurisdiction; and then the statute (b) enacts that whenever the committee shall so report, the party or parties who shall have appeared before the committee in opposition to such petition, shall be entitled to costs. In another clause (c) I find this generality of

(a) *Nottingham case*, 1803, *Introduction to Peck. Elect. Cases*, 46.

(b) 28 G. 3. c. 52 s. 19.

(c) *Sect.* 18.

expres-

expression, viz. "*every party* or parties, who shall have appeared before them in opposition to such petition."

Why, therefore, are we to say that none other than those who shall have appeared before them in opposition to the return are to be considered as parties, when the language of the statute plainly is, "in opposition to the petition?" I confess I am not for restraining the generality of the enacting clause by the preamble, without some reason for it.

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LE BLANC J. No one who reads the petition can doubt that the returning officer is a party complained against, and the committee have admitted him as such to defend himself. He might have become subject to punishment if the charges had been made good against him. It seems to me that he comes within the express provisions of the statute.

BAYLEY J. The argument is that a party may be charged with corruption, and yet if he appear to defend himself against the charge it must be at his own expence.

DAMPIER J. The being a party entitled to strike the committee stands on a different reason from the present case. But if a person whose office is to make the return be charged with corrupt conduct in that office, is it consonant with reason to say that he is not a party if he appear in order to repel the charge? And I have always understood it as a standing rule in the construction of acts of parliament, that the enacting clause shall not be restrained by the preamble, if the enacting

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words are large enough to comprehend the case (*d*);
and here the words are large enough.

Judgment for the Plaintiff.

(a) See *Bac. Abr.* tit. *Statute*, I 2.

Friday,
June 2d.

MAIR and Others, Assignees of T. MAIR, Bankrupt, against GLENNIE and Others, Assignees of SHARPE and Co., Bankrupts.

A transfer of a ship and cargo at sea, conveyed by *M.* to *S.* as a security for money borrowed, by executing and delivering to *S.* a bill of sale of the ship, a policy upon ship and cargo, and indorsing the bills of lading, was held not to pass the property to *S.*, where *S.* neglected, upon the ship's return and notice thereof, to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of *M.*, who became bankrupt, as being in the possession, order, and disposition of *M.* at the time when he became bankrupt within the stat. 21 *Jac.* I. c. 19. Also that an agreement between *M.* and the captain, that the captain should have one-fifth share of the profit or loss of the voyage on ship and cargo, did not prevent *S.* from taking possession.

ASSUMPSIT for money had and received. Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after *Hilary* term, the case was thus:

Mair (the bankrupt) was in *February* 1812 owner of the *American* ship *Navigator*, bound with a cargo belonging to *Mair* on a voyage to the *Havannah*, and to take in a return cargo for the *Baltic*. *Young* was the master of the ship, under an agreement between him and *Mair*, which was contained in a letter from *Mair* to *Young*, and signed as accepted by *Young*, that he (*Young*) was to have in lieu of all wages, primage, &c. one fifth share of the profit or loss of the intended voyage, on ship and cargo, and was to follow *Mair's* instructions, do all the business himself that he could do, and for the rest make the best bargains he could. The ship sailed for the *Havannah* on the 1st of *March*; and on the 3d, *Mair* being indebted to *Sharpe* and Co. for ad-

vances

vances made by them, and having negotiated for farther advances, executed to them a bill of sale of the ship for the consideration as expressed in it of 1900*l.*, and put into their hands a policy upon ship and cargo, as a security for these advances. The ship arrived at the *Havannah*, discharged her cargo, and took in a return cargo, for which *Young* signed bills of lading, making the goods deliverable to *Mair* or assigns, and sailed from the *Havannah*. On the 10th of *July*, *Young*, having received orders from *Mair* to touch at a port in *England*, reached *Cowes*, and informed *Mair* by letter of the ship's arrival there, and on the 14th brought her round to *Sheerness*. *Mair* informed *Sharpe* and Co. of the ship's being at *Cowes*, and that she was coming up the channel, and indorsed to them the bills of lading, and on the day after her arrival at *Sheerness* directed *Young* to proceed with ship and cargo to *St. Petersburg*, and to remit the proceeds to *Sharpe* and Co.; of which *Young* on the same day wrote to inform *Sharpe* and Co., telling them that he should remit to them the proceeds in bills or produce, as might appear to him most beneficial for the concern. The ship sailed from *Sheerness* on the 16th on her voyage, and was captured on the 12th of *August* by a king's ship as being *American* property, and sent into *Wingo Sound*. On the 15th of *September*, whilst she lay there, *Young*, who had hitherto been in the habit of communicating with *Mair* only, wrote to *Sharpe* and Co., informing them that "by his letter to them of the 15th of *July* he had referred them to *Mair* for future information, not knowing at the time that they had any thing more to do with the ship than to receive the proceeds of the cargo, but that since his return to that place he had learnt from

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Mair that *Mair* had transferred the ship and cargo to them, retaining only the management of the voyage." Afterwards he wrote to them again respecting the ship and cargo, but *Sharpe* and Co. never answered any one of his letters, nor did they signify to him their assent to the transfer, nor give any orders or do any act, while the ship lay at *Cowes* and *Sheerness*, to take possession of ship or cargo. The ship and cargo having been sent back to *London*, arrived there after both *Mair* and *Sharpe* and Co. had become bankrupts, and being libelled in the Admiralty Court by the captors as prize, the defendants by agreement with the plaintiffs appeared and put in their claim, and the ship and cargo were afterwards, by decree of the Court, given up to the defendants, who sold them and received the proceeds. *Sharpe* and Co. became bankrupt on the 1st, and *Mair* on the 2d of *October*.

There was a verdict for the plaintiffs. And upon a rule nisi obtained in the last term for a new trial, the point made was, whether under these circumstances *Mair*, at the time when he became bankrupt, had the possession, order, and disposition of the said ship and cargo, within the meaning of stat. 21 *Jac.* 1. c. 19. s. 11.; and *Atkinson v. Maling* was cited. (a)

Park, *Topping*, *Marryat*, and *Campbell* shewed cause, and distinguished *Atkinson v. Maling* from the present, chiefly because in that case the mortgagee never had an opportunity of taking possession before the bankruptcy, for the ship was at sea, and when she afterwards arrived he took possession the first moment that he could.

(a) 2 *T.R.* 462.

The Attorney-General, Scarlett, and Richardson, contra, argued, that the conveyance to *Sharpe and Co.* was not void within the stat. 21 Jac. For this was like *Atkinson v. Maling*, a mortgage of a ship and cargo at sea; and though the mortgagees never took actual possession, yet were they in virtual possession the moment that the transfer was notified to the captain, and he consented to hold the same and remit the proceeds to their account. For where the thing assigned is incapable of delivery at the time, notice is sufficient and is equal to a delivery; as if a debt, &c. be assigned (a), or goods in the hands of a warehouseman, notice to the debtor, or to the warehouseman will be sufficient. And it can make no difference whether that notice be given by the assignee himself, or, as in this case, by the assignor on his behalf. If there be no fraud, it is not necessary that a bill of sale should be followed by possession in order to complete the legal transfer (b). And here *Sharpe and Co.*, if they had minded so to do, could not have taken possession, for by the agreement between *Mair* and the captain, the latter was interested in ship and cargo to the extent of one fifth, in respect of which *Sharpe and Co.* could not have divested him of the possession.

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LORD ELLENBOROUGH C. J. Two points have been made in this case, first, supposing in other respects it was proper for the *Sharpes* to take possession, whether in respect of the captain's interest they were precluded from taking possession. And upon this point, it has been contended that the captain was virtually a partner,

(a) *Ryall v. Rolfe*, 1 Atk. 177.(b) *Kidd v. Rawlinson*, 2 B. & P. 59.

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but on what ground has it been so contended? The ground is because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo; but according to that mode of argument every seaman in a *Greenland* voyage would become a partner in the fishing concern. There is no pretence therefore for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure. This point then being laid out of the case, the question comes to this, whether the possession remained in *Mair* the original proprietor, so that he is to be considered within the meaning of the statute of *Jac.* as having at the time of his bankruptcy the possession, order, and disposition. Now it appears that in *March*, shortly after the ship sailed for the *Havannah*, an instrument, purporting to convey the ship for the consideration of 1900*l.* paid to *Mair*, was executed by him to the *Sharpes*, which would have entitled the *Sharpes* to have taken possession, at least in the nature of mortgagees. They could not perhaps have been considered as outright purchasers, but only as mortgagees in possession. The ship being at sea and not capable of manual possession at that time, do the *Sharpes* notify their purpose to the captain of taking to the ship, or do they upon the ship's return by any act on their part manifest that they mean to take possession. It is not pretended that they do; but it is said that the captain's letter of the 15th of *September* to the *Sharpes* shews that he had notice that *Mair* had transferred to them the ship and cargo. In that letter the captain writes from *Wingo Sound*, "that he had in a former letter of the 15th of *July* from the same place

referred them to Messrs. *T. Mair* for future information until his arrival at *Petersburgh*; not knowing at that time that they had any thing more to do with the ship than to receive the proceeds of the cargo; but that since his unfortunate return to that place *T. Mair* and Co. had informed him that they transferred the ship and cargo to them, retaining only the management of the voyage." And then he refers them to *Mair* for a particular account of the circumstances of his detention. Thus we find the captain writes to the *Sharpes* having since his return only to *Wingo Sound* been made acquainted with their relation to the ship and cargo by communication with *Mair* and Co. and he does not then know whether the *Sharpes* will or will not elect to take possession. Undoubtedly if they had purposed to take possession one would have thought that such a letter as that would have provoked them to signify their purpose. It is said that the captain continued to write to the *Sharpes*; but they never answered any of his letters. One of the *Sharpes* who was a witness proved that fact, and also proved that they neither took nor ordered possession to be taken at any time. How then shall we, against the positive declarations of the parties themselves, and the facts of the case, infer that they had the possession? That they had an opportunity of taking possession is plain, for they knew the ship was at *Cowes*, and understood, that she was to come to the river. Therefore they had an opportunity of taking possession at that time, and of perfecting their title as mortgagees, and if they had so done, this would not have been a case within the statute. But they have not done it, the reason of which probably was that they might not subject themselves

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selves under the circumstances to demands against them as owners in respect of the supplies made to the ship. Here then is not only not any constructive possession, but there is the strongest negative construction arising from the declarations and conduct of the *Sharpes* that they designed, not to take possession, and not to attach upon themselves the burthen of being the ship owners. Therefore this was not a possession in the *Sharpes* to prevent the statute of *Jac.* operating to pass the property to the assignees of *Mair*, as being in his possession, order, and disposition at the time he became bankrupt; and so it seems to me that there is not any ground for a new trial.

LE BLANC J. I agree with that which has been stated by my Lord. On the first point it is impossible to see from the letter produced, which is the only evidence of the captain's interest, that it stood in the way of the mortgagees taking possession. That letter amounts to nothing more than an allowance of a certain sum to the captain in proportion to the profits of the voyage in lieu of wages; and the conveyance by *Mair* to the *Sharpes* conveyed to them the property which *Mair* had subject to the captain's rights under that agreement. The next question is, whether at the time of *Mair's* bankruptcy he continued in the visible ownership of the property by the consent of the *Sharpes*. Now I take it to be a settled rule, that a conveyance of a ship at sea, in which case the party cannot take possession, may be made effectually, provided he does take possession as soon as he has an opportunity. In this case a conveyance was executed, and it appears that the parties to whom it was executed might afterwards

wards have taken possession, but they neglected to do so while the ship was in the river; therefore that is a circumstance to shew, that they did not intend to take possession at that time. It is true that after that time they had no other opportunity of taking actual possession, but still they had an opportunity of doing every thing which under the circumstances might have been done, but they desisted from doing any thing. Their conduct also shews that they did not consider the captain to be acting as their agent, for they never answered his letters or signified to him that they acceded to the instructions given him by *Mair*: on the contrary they appear to have observed a profound silence. Coupling this with the parol evidence of *Sharpe*, who admitted they never took, and as I understand it, never intended to take possession, it seems to me that down to the time of the bankruptcy of *Mair* the property continued in his possession and under his control by the permission of the *Sharpes* the owners; for the latter avoided every opportunity which offered of taking possession. Therefore I think this rule ought to be discharged.

BAYLEY J. It seems to me that this verdict is correct. There is no pretence for saying that the captain was a part-owner; all that he had a right to insist on was that the ship should go to the port of her destination. But if he had been a part owner, it seems to me that it would have made no difference; because if this conveyance had transferred but a part of the property, still there would have been an obligation on the *Sharpes* to take possession in order to prevent *Mair's* having the apparent ownership. As to the other point, I think there

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there might be some little difficulty on the statute of *Jac.*, but there is none I think on the stat. of *Eliz.* With respect to the statute of *Jac.* the property must be in the possession, order, and disposition of the bankrupt by the consent of the true owner at the time of the bankruptcy; and unless it be in the possession, order, and disposition of the bankrupt at that time, the statute does not apply. Now I feel some difficulty in carrying this case to such an extent; for the ship was not in the possession of the bankrupt at the time of his bankruptcy, but of *Young* the captain; and the captain, it appears, knew that the ship had been assigned to the *Sharpes*, and that he should have to account with them respecting her, and had so communicated to the *Sharpes*. After that I am inclined to think that what had taken place was sufficient to subject the captain to account with the *Sharpes*, and therefore that at the time of *Mair's* bankruptcy, he was to be considered as agent of the *Sharpes*, and could not have justified paying over the proceeds to *Mair*; it would have been inconsistent with the terms of his letter to them so to do. It is true indeed that they never made any answer to his letters, nor took any step to clothe themselves with the possession; but I cannot say that through their neglect in that respect the captain would have been relieved from all future claims of the *Sharpes*; and if he would not, I feel some difficulty in saying that the possession, order, and disposition of this property was in *Mair* at the time of his bankruptcy. But upon the statute of *Eliz.* I have not any difficulty in saying that the *Sharpes* were bound to take possession as soon as an opportunity offered. Perhaps it was their duty to have written to the captain immediately upon the assignment. But however that
may

may be, it was certainly their duty when the ship arrived in this country, to take such steps as would vest in them the possession. It appears that they were apprized of the ship's arrival at *Cowes* in *July*, yet they never attempted to take possession themselves, or gave any orders for that purpose, whereby they evidently shewed that it was not only their intention not to take possession, but that they studiously avoided it. Notwithstanding this, they now seek to set up their claim under the bill of sale, according to the terms of which they ought to have taken possession. By their neglect so to do, they enabled *Mair* to hold out a false credit, for down to a very late period if the captain had been asked whether the ship remained the property of *Mair*, he would have answered in the affirmative.

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DAMPIER J. I agree that there ought not to be a new trial. With respect to the first point I think all that the captain had a right to require, was that the ship should go the voyage, but no farther. On the second point, this conveyance, as it seems to me, falls within the stat. of *Jac.* for it appears that the *Sharpes* never meant to take possession of the ship, but chose rather to avoid it. Although *Mair* informed the captain in *July*, that the proceeds were to be accounted for to the *Sharpes*, yet I think the order and disposition is to be considered as being with *Mair*. Afterwards it appears that *Mair* must have communicated by letter to the captain that he had transferred the ship and cargo to the *Sharpes*. But when the captain writes to the *Sharpes* that he was to be accountable to them for the proceeds, and afterwards that he had learned that the ship and cargo had been transferred to them, they wholly decline
 answering

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answering his letters, and neglect to clothe themselves in any way with the possession, so as to shew to the world that they were the owners, or to enable any person who might furnish supplies to the ship, to charge them in their character of owners. Therefore it seems to me that they left the order and disposition of this property as to the rest of the world, however it might have been as to the captain, with *Mair*, who could not make a valid transfer to them, without something done on their part to indicate a change of possession. But this the *Sharpes* studiously avoided to do; and therefore *Mair* is the person who must be considered as having at the time of his bankruptcy, by the consent of the *Sharpes*, the order and disposition of this property. And if this be so, there ought not to be a new trial.

Rule discharged.

Saturday,
June 3d.

The KING *against* The Churchwardens and Overseers of the Poor of the several Parishes of ST. MARGARET and ST. JOHN, WESTMINSTER.

Although a mandamus does not lie to the churchwardens to make a church-rate, yet it lies to the churchwardens. &c. of two united parishes, under stat. 10 *Ann.* c. 11., to assemble a meeting, pursuant to s. 24., for the purpose of agreeing upon and ascertaining the monies and rates to be assessed for the repair of the church of one of those parishes.

THE Church of *St. John Westminster* was one of the 50 churches built pursuant to the stat. 9 *Ann.* c. 22., and the parish was divided and taken from that of *St. Margaret* pursuant to stat. 10 *Ann.* c. 11. s. 8. but no perpetual division of the two parishes according to the mode prescribed in s. 22. was made, and the rates of the two parishes continued joint. The parish church

of

of *St. John* became ruinous and required repair, the expence of which, upon a survey made, was estimated at 8500*l.*, upon which the churchwardens and overseers of *St. John's* caused notice to be given to the churchwardens and overseers of *St. Margaret's*, that they the churchwardens and overseers, together with the vestry or principal inhabitants of *St. John's*, would attend in the vestry-room of *St. Margaret's* on *Tuesday* in *Easter* week at the hour of 11 *A. M.* to meet the churchwardens and overseers and the vestry and principal inhabitants of *St. Margaret's*, for the purposes mentioned in 10 *Ann. c. 11. s. 24.*, *i. e.* to agree upon and ascertain the monies and rates to be assessed within the limits of the two parishes for the repair of the said church, and to divide, ascertain, and apportion such monies and rates in manner and form as directed by the said act, and that due notice of such meeting would be given by them in their church, and they required the churchwardens and overseers of *St. Margaret's* to give the like notice in their's. Notice was accordingly given in the church of *St. John*, but not in that of *St. Margaret*, and on the day appointed for such meeting, a meeting took place and several propositions were made on the subject of the repairs, and the mode of raising the money towards such repairs, and making a church-rate in the two parishes to defray the same, but the chairman refused to take the sense of the meeting upon them, it appearing that the parish officers of *St. Margaret's* had refused or neglected to give due notice as they were required.

Whereupon a rule nisi was obtained for a mandamus to the churchwardens and overseers of these two parishes to summon a meeting of the churchwardens and overseers,

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The KING
against
The Church-
wardens of
ST. MARGA-
RET.

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The KING
against
The Church-
wardens of
ST. MARGA-
RET.

seers, and of the vestry or principal inhabitants of the two parishes, for the purposes mentioned in the above notice.

The Attorney-General and Holroyd shewed cause, and cited *Rex v. St. Peter's Thetford* (a) to shew that as the subject-matter of this application was a church-rate, a mandamus would not lie. They also submitted upon the construction of the 24th sect. of 10 *Ann.* that the rate for the repair of the respective churches was not to be a joint rate, but was to be divided and assessed separately in each district for the repair of the respective church to which such district should belong. As if it should appear that 5000*l.* were necessary for a church-rate, and of that sum 4800*l.* were required for repairing the church of *St. John*, and 200*l.* for that of *St. Margaret*, the churchwardens, &c. are to divide the rate upon each district accordingly. And great hardship would ensue in this case, if it were otherwise, because the parish of *St. Margaret* have hitherto repaired their own church at their own expence without calling upon *St. John's*.

But *per Curiam*, The burthen seems to be intended to be cast on the united parishes, for they are first to agree upon and ascertain the gross sum to be assessed within the limits of the original parish for the several purposes mentioned, and then to divide and apportion the same upon every part according to the value of the lands and estates therein assessable. And although this Court will not interfere by mandamus to compel the churchwardens, &c. to make a church-rate, which

(a) 5 T.R. 364.

is properly of ecclesiastical cognizance, the rights and powers of which are saved by the act (a), yet they will put in motion their functions *in ordine ad*, i. e. to assemble in order to inquire and agree whether it be fit that a rate should be made.

Rule absolute.

Abbott was in support of the rule.

(a) S. 26.

The KING *against* BARZEY and Others.

Monday,
June 5th.

UPON a rule nisi, obtained for an information in nature of quo warranto against the defendants for exercising the offices of burgesses of *Pembroke*, the affidavit in support of the rule, which was made by three deponents, one stating himself to have been a burgess for 29 years, the second for 14 years, and the third for 30 years and upwards, deposed that they (the deponents) had been informed and believed it to be true, that by the constitution of the borough there ought to be one mayor, and 12 of the more discreet men of the borough called common councilmen, and no more, and that such mayor and common councilmen were constituted by a charter of *Rich. 3.*, and that the said charter directs the mayor to be chosen from among the said 12 common councilmen, and that for many years past many persons exceeding the number of 12 had usurped the offices of common councilmen, &c. contrary to the provisions and directions of the said charter, &c., and then it proceeded to state that one *A. I. Stokes* in 1807 usurped the office

Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter, the affidavit must state that the charter was accepted, or that the usage has been in conformity to the charter; and the Court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it.

1815.

The KING
against
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of common councilman, there being then 12 existing common councilmen, and afterwards in 1809 usurped the office of mayor, not being one of the 12 out of whom the mayor ought to have been chosen; and whilst so usurping the office of mayor, together with others who pretended to be the common council, assembled without notice to the burgesses at large, and chose, admitted, and swore in the defendants as burgesses. But the affidavit did not state that any usage had ever obtained conformably to the charter of *Rich. 3.* or that such charter had ever been accepted.

And for this reason *Dauncey*, who shewed cause, objected to the sufficiency of the affidavit, contending that in the absence of any allegation that the charter was accepted, or that the usage had been conformably to it, there was nothing to shew that this was the existing and governing charter of the borough.

Scarlett contra argued that enough appeared by the affidavit to shew both an acceptance of the charter and an usage under it; for the affidavit states "that by the constitution of the borough there ought to be a mayor," &c. whence a necessary inference arises that such is the existing usage, else how could it be true that by the constitution there ought to be; and the affidavit adds "that such mayor, &c. were constituted by charter of *Rich. 3.*" from which it plainly appears that the charter exists, because those who are constituted by the charter ought to exist.

Lord ELLENBOROUGH C. J. All that is stated upon the affidavit might be predicated of a charter which
had

had never been accepted. But unless it is sworn to have been accepted, or there is pregnant evidence of having acted under it, so as to authorize us to infer its acceptance, we cannot proceed. The constitution of this borough may be as sworn according to the charter, but unless that charter was accepted, it will not be the existing constitution; and we ought to see that by the affidavits. To shew it to be the efficient rule for the government of the borough, it ought to be stated that such is the usage of the borough, or that the charter was accepted. This is a very loose manner of deposing to the fact.

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The King
against
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and Others.

DAMPIER J. This seems to be an experiment to avoid deposing to the acceptance of the charter. I never remember a rule of this sort granted without a positive affidavit that the charter was accepted and acted upon.

Scarlett then prayed for leave to amend the affidavit.

But, *per Curiam*, that would be a dangerous precedent; the parties must make a new application.

Rule discharged.

1815.

Monday,
June 5th.

RAWSTORNE *against* WILKINSON and Others.

Where the sheriff levied under a fi. fa., and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff: Held that the stat. 43 G. 3. c. 46. does not take away his remedy by action of debt against the plaintiff for his poundage.

DEBT by the sheriff of the county palatine of *Lancaster*, on stat. 29 *Eliz. c. 4.*, for poundage, also for work and labour, money paid, and on an account stated. Plea Nil debet.

At the trial before *Le Blanc J.*, at the last *Lancaster* assizes, the case was this:

The defendants having recovered in an action against one *Blount* upon promises, proceeded against the bail, and sued out a fi. fa. against them directed to the sheriff of the county of *Lancaster* indorsed to levy 449*l.* 10*s.*, besides, &c. under which the sheriff levied, and received the money. Afterwards judgment and execution against the bail were set aside for irregularity, and the money was ordered to be returned; in consequence of which the sheriff, with the assent of the defendants' attorney, paid back the money to the bail. And it was objected that since the stat. 43 G. 3. c. 46. s. 5. debt does not lie for the sheriff against the plaintiff in the action for poundage for executing a fi. fa., but the same ought to be levied upon the goods of the defendant over and above the sum recovered by the judgment. 2dly, Admitting that in general the action would lie, yet in this case, where the judgment and execution have been set aside and the money restored, the sheriff shall not have it. The learned Judge directed a verdict for the plaintiff, reserving liberty to the defendants to move for a nonsuit.

Accord-

Accordingly, a rule nisi having been obtained in the last term, *Richardson* (with him *Scarlett*) now shewed cause, and argued that by stat. 29 *Eliz. c. 4.* the sheriff might have debt for his poundage, and for this he cited *Lyster v. Bromley* (a), *Jayson v. Rash* (b), *White v. Haugh* (c). And the 43 *G. 3. c. 46.* does not take from the sheriff generally his remedy against the plaintiff for poundage, &c., but only provides that in certain cases, as where execution is against the goods and not against the person, the plaintiff may levy the poundage over and above the sum recovered. For if the goods be insufficient for the plaintiff to levy both debt and poundage, it is plain that unless the sheriff may demand his poundage of the plaintiff, he will be without remedy, which the statute could never intend. Therefore his remedy shall be entire as before the statute, either to retain for his poundage, or, if he pay the money over, to have his action. Now the sheriff in this case has not retained, but in pursuance of the order of the Court, and with the assent of the defendants, has restored the whole sum levied; therefore he shall have his action, unless he is not entitled to poundage by reason that the judgment and execution have been set aside; but *Earle v. Plummer* (d), *Alchin v. Wells* (e), *Bullen v. Ansley* (f), all shew that this makes no difference, for if the sheriff has regularly levied, he is entitled to poundage, and has nothing to do with the regularity or irregularity of the antecedent proceedings.

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 RAWSTORNE
 against
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(a) *Cra. Car.* 286.(b) *Salk.* 209.(c) 2 *Str.* 1262.(d) *Salk.* 332.(e) 5 *T. R.* 470.(f) 6 *Esp. N. P. C.* 111.

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RAWSTORNE
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J. Parke, contra, submitted that since the stat. 43 G. 3. c. 46. the sheriff shall no longer demand his poundage of the plaintiff, who sues the execution, but shall levy it upon the defendant's goods. For the words of s. 5. that the "plaintiff *may* levy the poundage," &c. are compulsory upon him that he *must* levy; in the same manner as the words of stat. 9 W. 3. c. 11. s. 8. that "the plaintiff *may* assign breaches," &c. are compulsory on him so to do (*a*). And supposing the late statute has made no difference in respect of the sheriff's right to poundage, yet in this case he shall not have his action, for by the 29 Eliz. c. 4. he is entitled only to poundage "upon such sum as he shall levy or extend, and *deliver in execution*." Wherefore, as he has not made a levy as complete as the statute prescribes, he has no right to poundage; and before he can have an action he ought to return the writ, and that he has levied. *Alchin v. Wells* and *Bullen v. Ansley* do not decide that the sheriff may become an *actor* and bring debt for his poundage, for in those cases the sheriff was the party defendant.

Per Curiam. The execution being irregular was owing to the fault of the defendants and not of the sheriff, and therefore he shall not be deprived of his poundage on that account. And the 43 G. 3. c. 46. does not vary his rights, but gives a boon to the plaintiff in the action, who is entitled to levy under an execution against the goods of the defendant, that he may levy the poundage, fees and expences of the execution, over and above the sum recovered by the judg-

(a) *Roles v. Rosewell*, 5 T. R. 538.

ment. Before this statute the sheriff used to levy the sum recovered by the judgment, and satisfy himself out of it for the poundage, and pay over the residue, but now the plaintiff may also levy the poundage, which is more than he could before do. And the authorities referred to have determined that the sheriff is entitled to poundage if he levy, and that in such a case as the present he shall not be ruled to return the writ.

Rule discharged.

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RAWSTORNE
against
WILKINSON.

STEPHENS and Others, Assignees of SPENCER
and Another, Bankrupts, against ELWALL.

Monday,
June 5th.

TROVER for goods. Plea, not guilty. At the trial before *Le Blanc J.* at the last *Lancaster* assizes the case was this:

The bankrupts being possessed of the goods in question sold them after their bankruptcy to one *Deane*, to be paid for by bills on *Heathcote*, who had a house of trade in *London*, and for whom *Deane* bought the goods. *Heathcote* was in *America*, and the defendant was his clerk, and conducted the business of the house. *Deane* communicated to the defendant information of the purchase on the day it was made, and the goods were afterwards delivered to the defendant, and he disposed of them by sending them to *America* to *Heathcote*. No demand was made upon the defendant until nearly two years after the purchase. The learned Judge inclined to think, and so stated to the jury, that if the defendant was acting merely as the clerk of *Heathcote* he was not liable; but if he was transacting business for himself, though in the name of another, then he

A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master.

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 ———
 STEPHENS
 against
 LEWALL.

would be liable. The jury found a verdict for the defendant. And upon a rule nisi obtained in the last term for a new trial, in order to question the accuracy of the learned Judge's direction in point of law, *Perkins v. Smith* (a) was cited, and it was contended that the defendant being a tort-feazer, no authority that he could derive from his master would excuse him from being liable in this action.

Park, who now shewed cause, referred to the report of *Perkins v. Smith*, in *Sayer*, 40. and said, that the decision went too far, and that it had not been approved of by *Lawrence J.*, when cited to him on the western circuit. And he took this difference, that there the defendant received the goods with knowledge that the bankrupt had absconded and shut up shop. But in this case no demand was made until two years after the purchase; therefore it would be a great hardship if the defendant were to be liable in respect of a demand, which from the lapse of time it is impossible to comply with.

Topping and Richardson, contra, argued that the very assuming to dispose of another man's property, was a conversion, and cited *M'Combie v. Davies* (b) in support of that position; and in *Potter, Assignee, v. Starkie*, *Exch. M. T. 1807*, the Court held the sheriff liable in trover though he seized, sold, and paid over the money before commission issued, and before any notice, saying this necessarily followed from *Cooper v. Chitty* (c), for it was an unlawful interference with another's goods.

(a) 1 *Wils.* 328.

(b) 6 *East*, 538.

(c) 1 *Burr.* 20

Lord

LORD ELLENBOROUGH C. J. The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case. For what can be more hard than the common case in trespass, where a servant has done some act in assertion of his master's right, that he shall be liable, not only jointly with his master, but if his master cannot satisfy it, for every penny of the whole damage; and his person also shall be liable for it; and what is still more, that he shall not recover contribution?

LE BLANC J. I think the rule of law is very different from what I considered it at the trial. The great struggle made at the trial was, whether the goods were for *Heathcote* or not; but that makes no difference if the defendant converted them. And here was a conversion by him long before the demand.

Per Curiam,

Rule absolute.

1815.

STEPHENS
against
ELWALL.

1815.

Monday,
June 5th.

ASTEY against EMERY.

L., a cornfactor at *N.*, agreed to sell barley of the plaintiff to the defendant, to be delivered at *L.*'s warehouse at *D.*, to go by the first boat of *L.* which went from *N.* to *D.*, at 38s. per quarter, which was a higher price on account of its being to be delivered at *L.*'s expence; and the barley being then in the hands of *T.*, the defendant desired him to see it delivered and measured and put up properly, and the barley was sent by *L.*'s first boat, and the invoice delivered to the defendant, who requested time to pay, but afterwards refused to accept the barley : Held in assumpsit for the price that this was a contract for the sale of goods within 29 Car. 2. c. 3. s. 17., and not a mixed contract for the carriage as well as sale, though the price was enhanced by the carriage; and that the defendant's having appointed the particular boat, and having desired *T.* to inspect the loading, did not amount to an acceptance on his part.

ASSUMPSIT for goods sold and delivered, and the money counts. Plea, non assumpsit. At the trial before *Bayley J.* at the last *Nottinghamshire* assizes the case was thus :

The action was for the price of a quantity of barley, the property of the plaintiff, which *Longstaffe*, a cornfactor at *Nottingham*, on the 18th of *November*, agreed to sell to the defendant at 38s. per quarter. The barley being then in the hands of one *Turner* for the purpose of being kiln-dried, and *Longstaffe* having a warehouse at *Derby*, it was agreed that it should be delivered at *Longstaffe*'s warehouse there, to go by the first boat of *Longstaffe* which went from *Nottingham* to *Derby*. The 38s. per quarter was a higher price on account of the delivery being to be made at *Longstaffe*'s expence. The defendant went to *Turner*, told him that he had bought the barley, and desired him to see it delivered, and measured, and put up properly. Two or three days afterwards the barley was sent by *Longstaffe*'s first boat, and on the 26th of *November*, *Longstaffe*'s clerk saw the defendant at *Derby* and delivered him the invoice, and the defendant took it and requested a week longer to pay the money, which was allowed him. On the same day, however, he gave notice that he would not accept the barley. The barley arrived at *Longstaffe*'s warehouse at *Derby* on the 1st of *December*. It was objected

for

for the defendant upon the statute of frauds (a), that this being a contract for the sale of goods for the price of upwards of 10*l.*, was void for want of part acceptance, or earnest, or some note in writing. To which it was answered, that this was not simply a contract for the sale of goods, but a mixt contract for the carriage as well as the sale of them; for the 38*s.* included the price for carriage. The learned Judge being of opinion that it was a sale within the statute, directed a nonsuit, but gave leave to the Plaintiff to move to enter a verdict.

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 ASTLEY
 against
 EMERY.

Accordingly, *Vaughan* Serjt. obtained a rule nisi in the last term, and made a second point, viz. that here was a delivery to the defendant; for the defendant not only directed the mode of conveyance, but appointed the particular boat, viz. *Longstaffe's* first boat, and employer *Turner* to look to the delivery for him. Therefore the delivery on board the boat at *Nottingham* was a delivery to the defendant, and the defendant so considered it, for when he had notice of it, he obtained time for payment.

Copley Serjt. and *Reader* shewed cause; and argued that if the answer given to the objection, made at the trial, could prevail, it would avoid the statute in every case where a sale is to be followed by delivery of the goods. For in every such case the trouble of the delivery might be said to form one ingredient amongst others in the price. But they urged that the price of any commodity was one entire thing, and could not be divided into so many payments as there might be con-

(a) 29 *Car. 2. c. 3. s. 17.*

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 against
 EMERY.

siderations included in the price. In *Kent v. Huskinson* (a) the goods were to be delivered, and there was one entire price, yet adjudged that it was a sale within the statute. 2dly, As to the delivery, the pointing out the first boat was only to fix the time and not the place of delivery, for by the terms of the agreement the delivery was to be at the warehouse at *Derby*; and the boat was the vendor's own boat, so that the barley was never out of his custody.

J. Balguy (with him *Vaughan Serjt.*) contra, observed, that *Longstaffe* was not the vendor, but only agent of the vendor for the purpose of sale; but for the purpose of the delivery was agent for the vendee, because the vendee made him his appointee to receive the barley. And he farther insisted upon the points made at the trial and when the rule nisi was obtained, particularly as to *Turner's* being directed by the defendant to inspect the measuring and loading of the barley.

LORD ELLENBOROUGH C. J. I do not find that *Turner* did any corporal act at the time of the loading to shew that he was acting for the owner, or that he was to exercise any other office than that of a spectator. The barley being in his hands at the time of the sale, it was natural enough, because it was beneficial to the defendant, to avail himself of the opportunity of *Turner's* presence to see that the quantity was correct, and the quality uninjured by the loading, which he might do without meaning that it should amount to an acceptance on his part. And if this had been a mixt contract, one should have expected a separate charge for the delivery.

(a) 3 B. & P. 233.

BAYLEY

BAYLEY J. At the time when *Turner* was to inspect the loading of the goods, it is plain that the vendee had no right to have them, for they were to be delivered at *Derby*.

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 ASTRY
 against
 EMBRY.

DAMPIER J. This is no more than the case of a farmer who sells his corn to a miller to be delivered at the mill.

Per Curiam,

Rule discharged.

**DOE, on the Demise of SPENCER, against
 GODWIN and Others.**

*Monday,
 June 5th.*

EJECTMENT upon a proviso for re-entry for assigning without the leave of the lessor. At the trial before *Dampier J.* at the last *Wiltshire* assizes the case was this:

The lands were demised to the defendant by indenture for years, rendering rent, and the defendant covenants by the said indenture that he will pay the rent, &c. and will not assign the premises or any part thereof without leave of the lessor, provided always that if the said rent shall be in arrear for 21 days, &c. or if all or any of the covenants or agreements *hereinafter* contained, on the part of the lessee to be done and performed according to the true meaning of these presents, shall happen to be broken in any respect, then it shall be lawful for the lessor to re-enter, &c. And there were not any covenants after this proviso on

Lease for years by indenture rendering rent, and lessee covenants with lessor that he will pay the rent, and will not assign without leave of lessor, provided that if the rent be in arrear, or if all or any of the covenants *hereinafter* contained on the part of lessee shall be broken, it shall be lawful for lessor to re-enter; and there were no covenants on the part of lessee after the proviso, but only a covenant

by lessor that lessee paying, &c. and performing all and every the covenants *hereinbefore* contained on his part to be performed, &c. should quietly enjoy: Held that lessor could not re-enter for breach of the covenant not to assign, for the proviso is restrained by the word *hereinafter* to subsequent covenants, and though there were none such, yet the Court could not reject the word.

the

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—
Doe
against
GODWIN.

the part of the lessee, but only a covenant on the part of the lessor, that the lessee paying the said rent, &c. and performing all and every the covenants *hereinbefore* contained on his part to be performed, &c. should quietly enjoy, &c. The defendant entered and afterwards assigned a part without leave. And it was objected at the trial that this was not a forfeiture of the lease within the proviso, by reason that the covenant not to assign preceded the proviso, and the proviso only relates to covenants *hereinafter*, i. e. that follow, and not that precede it. And of such opinion was the learned Judge, being inclined in a case of forfeiture to hold to a strict construction, and not thinking himself at liberty to reject the word *hereinafter*; and so he directed a nonsuit.

Burrough in the last term obtained a rule nisi for a new trial, and he said that to hold this proviso not to extend to preceding covenants was to defeat its operation in toto, because there was not any subsequent covenant to which it could by possibility be applied. And the words of this proviso are as much the words of the lessee as of the lessor, wherefore it shall be taken as strongly against him; and the rule of law which requires a strict construction in cases of forfeiture, does not require that it should be such as must necessarily defeat the intention of the parties. The rule is borrowed from the construction of conditions precedent, which must be literally performed before the estate can vest; but on a condition subsequent, as in this case, where the estate is vested, but depends for its continuance on the breach of the condition, the rule is not so strict (a).

(a) See 1 Vern. 83. Co. Lit. 218.

And

And it appears by *Co. Lit.* 213. *a.*, that words in a condition shall be taken out of their proper sense, *ut res magis valeat quam pereat*; therefore in this case the word *after* may either be read *before*, or it may be rejected as insensible and making the proviso of none effect; or according to *Plowd. (a)*, the Court may so marshal the words, i. e. by making the proviso in this instance change place with the covenants, that the one part may be consistent with the other, and the whole have effect. Or if the covenant "that the lessee *paying, and performing all and every the covenants hereinbefore contained*, shall quietly enjoy," which follows the proviso, be construed to be in effect a covenant on the lessee's part that he will perform the preceding covenants, then it will draw down those covenants to the subsequent part of the lease the same as if they had been repeated after the proviso.

Lens Serjt., Gaselee, Mereweather (with them *Bayly*) shewed cause, and took a difference between covenants and conditions, viz. that a condition which destroys or defeats the estate or grant is to be construed strictly, but a covenant is to be construed according to the intention of the parties. And in this case the lessor is not without a remedy upon the covenant, though for the defect in the proviso, which shall be construed literally, he is not intitled to re-enter. And as to giving *hereinafter* a different sense, or rejecting it, or transposing the clauses in order that it may have effect, supposing it could be done, how does it appear that instead of serving the intent of the parties, this might

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 against
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(a) P. 523. 540.

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not be defeating it? For suppose the parties intended to add other covenants after the proviso, they might have used this word for the express purpose of restraining the proviso to such covenants; and it does not follow because there are no such covenants as the parties intended that it should relate to, that it must relate to such covenants as they did not intend. The doctrine from *Plowd.* is only applicable to cases of devise, where the intent is the principal point to be considered. And as to the words *paying and performing*, &c. in the covenant which follows the proviso, they do not amount to words of covenant on the part of the lessee, but only to words of condition.

Burrough, (with him *Moore* and *C. F. Williams*) contra, argued, that deeds like wills were to be expounded according to their intent, which was to be sought out from the whole language of the instrument, *ex antecedentibus & consequentibus*, and not from the misuse of one particular word. And here can be no doubt of the intent, for the lease contains all the usual covenants, and in the usual order, and therefore it is most improbable that any others should have been contemplated, and the proviso follows in the ordinary way; wherefore it is plain that by a clerical error, *hereinafter* is written, where it ought to have been *hereinbefore*. Then why may not this word be rejected? In the case of a marriage settlement important words may be rejected for the sake of the intention, as in *Smith v. Parkhurst* (a); and so they may in a notice to quit, where the intention is manifest. (b)

(a) 6 Bro. P. C. 351. 3 Atk. 135.

(b) *Doe v. Kightley*, 7 T. R. 63.

Lord ELLENBOROUGH C. J. I believe the safest rule for the construction of these instruments is to construe them according to the letter, unless we can see a decisive reason for departing from it. Now according to the letter there can be no doubt that "*hereinafter* contained" will not embrace covenants which go before. One thing, however, has introduced a doubt into my mind, and it is this, that covenants which respect the enjoyment or the termination of an estate, are covenants that relate to the same subject-matter. Therefore if I find the words *hereinafter* and *hereinbefore* in each of these, evidently relating to the same covenants, perhaps I ought to construe them in the same sense. Now the covenant for quiet enjoyment is, that the lessee paying the rent and performing the covenants *hereinbefore* contained, shall quietly enjoy, &c.; and the proviso for re-entry for non-performance of covenants is, if all or any of the covenants *hereinafter* contained shall be broken, &c. As these two covenants respect the period of enjoyment of the estate, I incline very much to construe them together, and as relating to the same covenants, in which case *hereinbefore* in the one would be inconsistent with *hereinafter* in the other, and I should reject *hereinafter*, upon the rule of *ex antecedentibus & consequentibus optima est constructio*. But on the other hand, if the plaintiff had declared upon this lease, and set it out, omitting the word *hereinafter*, or substituting in its place *hereinbefore*, I am afraid on non est factum he must have been nonsuited. Without professing then to be free from considerable doubts, I think the safest course is to give to this instrument a sense according to its letter, particularly as this is only a nonsuit. I therefore think the nonsuit must be sustained, though for the

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reasons stated I entertain considerable doubt whether I have come to the right conclusion.

LE BLANC J. I think we ought to be perfectly satisfied of the intent, before we consent to make so material an alteration as that which we are desired to make. But I cannot positively say that the parties might not have had it in view to insert some covenants after this proviso, and if they had any such intention, the word "hereinafter" would have stood properly in the place in which it does. But we are desired to say, that the parties had no such intention, that is, to put a construction on this instrument from conjecture that they had no such intention. The Court I think cannot do that, for in order to do it we must reject the words "hereinafter contained," by which we must entirely alter the frame and sense of the whole clause; therefore I think we cannot reject these words. If indeed the intention of the parties were perfectly clear, we should be bound, though in a case of forfeiture, to give to the instrument a sense conformably to such intention; yet it would be difficult to reject clear and positive words; but in this case I am not so fully satisfied of the parties' intention as to find it necessary to reject any thing.

BAYLEY J. If we could see clearly the intention of the parties, we ought to adopt that construction which would best give effect to the intention. Now here it is plain there is a mistake somewhere, but where it lies I am at a loss to discover. As the lease now stands, "hereinafter contained" is incorrect, because there are not any subsequent covenants on the part of the lessee to which it can apply; but whether the error lies in the
insertion

the said day and on the other days, &c. at, &c. became and were dangerously ill of the said contagious disease, and the defendant well knowing the premises, after he had so inoculated them, and while they were so dangerously ill of the said contagious disease on, &c. at, &c. did unlawfully and injuriously cause she said *A. S., W. M.*, and the said other infants, to be carried into and along a certain public street and highway called, &c. in and along which divers subjects were then passing, and near to divers dwelling houses, &c. to the great danger of infecting with the said contagious disease all the subjects who were on those days and times in and near the said street and highway, dwelling houses, &c. who had not had the disease, and *ad commune nocumentum*, &c.

The indictment being removed into this court, the defendant pleaded not guilty, and was found guilty.

And now it was moved by *W. Owen* in arrest of judgment, that this was not any offence. And he said that this indictment differed materially from that in *Rex v. Vantandillo (a)*, for by this indictment it appears that the defendant is by profession a person qualified to inoculate with this disease, provided it be lawful for any person to inoculate with it. Therefore unless the Court determine that the inoculating with the small pox has now become of itself unlawful, there is nothing in this indictment to shew it unlawful; for as to its being alleged that he caused them to be carried along the street, that is no more than this, that he directed the patients to attend him for advice instead of visiting them, or that he prescribed what he might deem essen-

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(a) *Ante*, 73.

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tial to their recovery, air, and exercise. And in *Reg v. Sutton* (a), which was an indictment for keeping an inoculating house, and therefore much more likely to spread infection than what has been done here, the Court said that the defendant might demur.

LORD ELLENBOROUGH C. J. The indictment lays it to be *unlawfully* and *injuriously*, and to make that out, it must be shewn that what was done was in the manner of doing it incautious, and likely to affect the health of others. The words *unlawfully* and *injuriously* preclude all legal cause of excuse. And though inoculation for the small pox may be practised lawfully and innocently, yet it must be under such guards as not to endanger the public health by communicating this infectious disease.

DAMPIER J. The charge amounts to this, that the defendant, after inoculating the children, unlawfully exposed them, while infected with the disease, in the public street, to the danger of the public health.

LE BLANC J. in passing sentence observed that the introduction of vaccination did not render the practice of inoculation for the small pox unlawful, but that in all times it was unlawful, and an indictable offence, to expose persons infected with contagious disorders, and therefore liable to communicate them to the public, in a public place of resort

The defendant was sentenced to
six months' imprisonment.

(a) 4 Burr. 2116.

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LAMB *against* BUNCE.Wednesday,
June 7th.

ASSUMPSIT for a surgeon's bill. Plea, non assumpsit. At the trial before *Dallas J.* at the last *Berkshire* assizes the case was thus:

One *Smith*, an under-carter to a farmer in *West Woodhay* parish, met with an accident, in driving his master's team, by having the waggon run over him, in the parish of *Hampstead Marshal*, by which one of his legs was fractured, and he was otherwise bruised. He was immediately conveyed to the nearest and most convenient house, which was a public house situate in the adjoining parish of *Enborne*, and distant about half a mile from the spot where the accident happened. *Smith* not being in a condition to be removed to his master's, the plaintiff, who was a surgeon and was generally employed to attend the poor of *Enborne*, was sent for, but it did not appear by whom, and he attended him daily from that time for upwards of two months, and until *Smith* recovered. During the period of his attendance the defendant, who was the overseer of *Enborne*, frequently visited *Smith*, and knew that the plaintiff attended him, and when *Smith* was fit to be removed, took him in a cart to his master's at *West Woodhay*. *Smith* was not a parishioner of *Enborne*. There was evidence that the plaintiff's charges were such as are usually termed pauper charges. It was objected for the defendant, as if this were a question between the two parishes of *Enborne* and *Hampstead Marshal*, which of the two was liable, that by law the parish in which the accident happens to a pauper is bound to sustain the expences of

Where a pauper had his leg accidentally fractured in one parish, and was conveyed to the next house in an adjoining parish, and was confined there and visited by the overseer, and attended by the surgeon who attended the parish poor, with the knowledge of the overseer: Held that the surgeon might have assumpsit against the overseer for the expences of the cure; for there was not any obligation against the parish where the accident happened to pay these expences, and the overseer's knowing of and not repudiating the surgeon's attendance was equivalent to a request.

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his cure, and not the parish into which he is conveyed from necessity. To which it was answered, that the parish in which he is from necessity found sick from the consequences of the accident, is in effect the parish where the accident happens. And as this was said to be a new question, the learned Judge directed a verdict for the plaintiff, giving the defendant leave to move for a nonsuit.

Accordingly a rule nisi was obtained in the last term. And now, after *Dauncey* and *Abbott* who were to shew cause had observed that *Enborne* was bound to relieve the pauper as casual poor, the Court desired to hear *Jervis* and *Shepherd* in support of the rule, who argued from the reason of the thing as well as convenience, that *Hampstead Marshal* ought to be liable, because it was the parish where the pauper really became poor and impotent by being disabled there, which was the *causa causans*, and because if the parish could shift the burthen from themselves by conveying him to another parish, it would open a door to fraud. And suppose the place to which the pauper was conveyed had been extra-parochial, doubtless the parish of *Hampstead Marshal* must have maintained him. In *Wennall v. Adney* (a) it seems to have been the opinion of the Court that the parish officers where the accident takes place are bound to assist; and so it was ruled by Lord *Eldon* in *Simmons v. Wilmot* (b). Admitting however that the parish officers of *Enborne* were bound to provide for the pauper during his sickness, yet are they not liable to pay another person for doing it without their request.

(a) 3 B. & P. 253.

(b) 3 Esp. N. P. C. 91.

As if a man pay my debt without my request, I am not liable to repay him, yet I was bound to pay my own debt. For though a moral obligation is a good consideration for an express promise, and therefore if the defendant had in this case promised to pay he would have been liable (a), yet it has never been carried farther, so as to raise an implied promise in law. (b)

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Lord ELLENBOROUGH C. J. This pauper was to be considered as casual poor wherever his infirm and indigent body was found, and he had a claim on the parish where he was so found to have his necessities provided for by them. That was the parish of *Enborne*, and I consider that when the parish officer visited the pauper according to his duty, and knew that the plaintiff who was generally employed for the poor was in attendance upon him, and did not repudiate his attendance, he in effect commanded it. It cannot be matter of dispute in point of law, and I could wish it were so understood, that where time is not afforded for procuring an order of justices, the law raises an obligation against the parish where the pauper lies sick as casual poor, to look to the supply of his necessities; and if the parish officer stands by and sees that obligation performed by those who are fit and competent to perform it, and does not object, the law will raise a promise on his part to pay for the performance. Mr. *Shepherd* has argued that a moral obligation is not sufficient to raise an implied promise to a third person, but I think this case is out of that objection, because the defendant, by not repudiating the

(a) *Watson v. Turner*, Bull. N. P. 147.

(b) *Athens v. Barwell*, 2 East, 506.

plaintiff's

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plaintiff's attendance, did that which is equivalent to a previous request. As to the objection that the parish of *Hampstead Marshal* was the place where the accident and injury arose, there is no pretence for saying that there is an exclusive liability attaching to the parish upon that account; there is no reason for connecting the place where the accident happened with the liability.

LE BLANC J. There is no doubt that if the parish officers had sent for the plaintiff to attend the pauper, he would have been bound so to do. For here the plaintiff was in the habit of attending the parish poor; therefore he was not a stranger, but a person pointed out by the parish as the person to attend to this duty. He does attend, and this with a full knowledge of the parish officer, who does not make any objection on his part; consequently the parish officer must be taken to have assented to it. Therefore there is quite sufficient to raise the presumption of a previous request.

Per Curiam,

Rule discharged.

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The King *against* The Court of Directors of
the EAST INDIA Company.

Thursday,
June 8th.

A RULE nisi was obtained in the last term for a mandamus to the Court of Directors of the *East India* Company to dispatch to the Governor in Council at *Fort St. George* in the *East Indies* certain orders and instructions in the form as altered and approved by the board of controul. By *stat. 33 G. 3. c. 52. s. 9.* the board of controul are invested with authority to superintend all acts, operations, and concerns, which relate to the civil or military government or revenues of the territories and acquisitions in the *East Indies*, and by *s. 12.* no orders or instructions whatever, relating to the civil or military government or revenues of the territorial acquisitions in *India*, shall be sent by the Court of Directors until approved of by the board, and for that purpose copies of all orders and instructions shall be laid before the board, and within 14 days the board shall either return them, approved of, or if they disapprove of, alter, or vary them, with their reasons and instructions relating thereto, and the Directors shall

Where the Court of Directors of the *East India* Company sent to the board of controul for their approval a draft of a dispatch directing payment to be made to *H.*, formerly commissary of grain to the *Indian* army, for a quantity of rice belonging to *H.*, and taken by the commander in chief for the use of the army, (for the having of which rice in his possession *H.* was dismissed by the Court of Directors, as being contrary to the existing regulations,) and the board of controul altered the draft of

the dispatch by substituting a different and higher rate of payment to *H.* than that proposed by the Court of Directors, which the Court of Directors refused to transmit to *India*, denying the authority of the board of controul to make the alteration; upon a rule for a mandamus to the Court of Directors to transmit the altered dispatch, held that this alteration made by the board was not within *33 G. 3. c. 52. s. 17.*, by which the board are prohibited from directing the increase of the established salaries, allowances, or emoluments of any governor or other officer in the Company's service, unless proposed by the Directors; or within *s. 18.*, by which the board are prohibited from directing the payment of any extraordinary allowance or gratuity to any person on any account whatever, to any greater amount than proposed by the Directors. And whether it be within *s. 16.*, by which the board have authority to issue orders which relate to the civil or military government or revenues only, is a matter to be determined by appeal to the privy council, and not by this Court; but the Court enlarged the rule to give the Directors an opportunity to make such appeal.

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forthwith dispatch the same in the form approved by the board. By s. 16. it is provided that nothing in the act shall extend to give the board any authority to issue or send any orders or instructions which do not relate to points connected with the civil or military government or revenues of the *British* territories or possessions in *India*, nor to expunge, vary, or alter any dispatches proposed by the Court of Directors which do not relate to the said government or revenues, and if the board shall send any orders or instructions to the Court of Directors, to be by them transmitted, which, in their opinion, shall relate to points not connected with the civil or military government or revenues, it shall be lawful for the Court of Directors to apply by petition to the king in council, and the king in council shall decide how far the same be or be not connected with the civil or military government and revenues of the territories and possessions in *India*, which decision shall be final.

The case as disclosed on the affidavit in support of the rule was this: In 1799, during the siege of *Seringapatam* there was a scarcity of provisions for the supply of the army, and Major *H.* being at that time in the service of the Company and commissary of grain attached to the army, and having in his possession, as his private property, 106,000 seers of rice, delivered the same into the public store for the use of the army, by the order of General *Harris* the commander in chief, and upon agreement with him, that Major *H.* should be paid the value by the Company. In consequence of this transaction, Major *H.* was in *March* 1800 suspended from the service by the government of *Fort St. George*, and afterwards dismissed by the Court of Directors.

Directors. In *August* 1807, the Company not having settled with *H.* for the rice, the Court of Directors sent to the board of controul, for their approval, a draft of a dispatch to be sent to the government of *Fort St. George*, directing that upon *H.* or his attorney producing satisfactory vouchers to shew the prime cost of the grain, and of whom purchased, with all charges incurred thereon previously to its delivery for the public use, the amount should be paid with interest at 8 per cent. upon *H.* or his attorney giving a discharge in full of all demands on account of the grain. In *May* 1808 the draft was returned by the board to the Directors, altered by substituting in place of the mode of payment proposed by the Directors, the valuation of one rupee per seer, subject to be reduced if, upon investigation of the probable costs and charges, that rate should be thought to exceed a fair indemnification to *H.* exclusive of any profit, with 8 per cent. on the sum due. A variety of correspondence between the board and Court of Directors followed upon the subject of this alteration, the board requiring the altered dispatch to be transmitted to *India*, and the Court of Directors denying the power of the board under the act of parliament to direct the transmission of such a paragraph, and they finally declined sending the same unless it should be judicially determined that they were precluded from exercising their discretion; and in answer to an inquiry from the board whether it was their intention to apply by petition to his majesty in council, in order to obtain that decision, they stated that they had no present intention of petitioning, reserving to themselves, however, that right if it should appear necessary.

In answer, the above facts were not denied, but it was stated in addition, that Major *H.* was appointed commis-

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sary of grain by the governor in council of *Fort St. George*, at a monthly salary, and with a monthly allowance for servants, and upon condition that he was not, on any account, directly or indirectly, to derive any other advantage or emolument from the situation, than the salary fixed; that *H.* was suspended, and afterwards dismissed on the ground of his having carried grain to *Seringapatam* with a view to derive emolument therefrom in defiance of the 39th article of the existing regulations. That the ordinary price of grain in the *Carnatic*, in ordinary times, when there is no scarcity, nor any extraordinary demand, is at the rate of about 20 seers for a rupee, and sometimes cheaper, and that rice could have been procured in the neighbourhood of *Madras* in *February* 1799 at the rate of about 14 seers for a rupee. That calculating it at that price in the market at *Madras*, and adding to it the expences of bullock hire for the carriage of it in a march of two months to *Seringapatam*, and other costs and incidental expences, besides loss by wastage, the total cost of 106,000 seers of rice would have amounted to 40,757 rupees and one-seventh, which is at the rate of two seers and three-fifths of a seer per rupee; that the price of one rupee per seer is a price which could only prevail from a degree of scarcity amounting to famine, and would have afforded to a vendor in the camp before *Seringapatam*, who had brought his rice from *Madras*, or had purchased it on the march, a very large profit.

Lens Serjt., Park, Bosanquet Serjt., and Spankie, who now shewed cause, argued that a mandamus does not lie unless it appear to the Court that the case is at least a *prima facie* case of doubt; and therefore if from the act of parliament it was plain in this case that the board

of controul had no authority over the matter of the dispatch, to alter it in the way they had done, this rule ought not to be granted. And they relied on sect. 16. in order to shew that the board has no such authority; for by that section they can issue orders which relate to the civil or military government, or the revenues only, whereas this matter does not relate to either, but is a matter purely of commercial concern between the Company and this person, touching the amount which he is entitled to be paid for his goods. And by the same rule that the board may interfere in this case, they may do so in every case where a demand exists against the Company for goods sold or the like, for which an action is the proper remedy. And it is not enough to answer, that if the board has no authority, then by sect. 16. the Court of Directors ought to have appealed to the privy council; for this court will not enforce by mandamus the doing of an act, which is not authorized by law, because the party who is called upon to do it, has not resisted the doing it by appealing to another tribunal. Secondly, Granting that this objection arising on sect. 16. can only be available upon appeal to the privy council, yet the Court will not grant the rule; because this is a case within the prohibition of the 17th and 18th sect., as to which no appeal lies to the privy council. For that which the board have substituted in this dispatch is in effect a direction by them, without its being first proposed by the directors, for the increase of the established salary or allowance of an officer in the Company's service, viz. the commissary of grain; for *H.* was appointed at a monthly salary and with a monthly allowance; which direction the board are by sect. 17. forbidden to give. Or it is at all events within sect. 18. a direction by the board

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board for the payment of an extraordinary allowance or gratuity to a person to a greater amount than proposed by the Court of Directors. And the whole scope and policy of the several *India* acts is to provide for the public administration of the government in *India*, but to prevent at the same time the government at home from interfering with any grant of money. And therefore by sect. 14. of this act, the board of controul cannot appoint any of the servants of the Company, nor by sect. 17. direct any increase of salary to any officer of the Company, nor by sect. 18. any allowance or gratuity to any person on any account whatever, which is not proposed by the Court of Directors; which prohibitions were studiously made in order to prevent the board on any pretence whatever from putting money into the pocket of any individual beyond what the Court of Directors proposed. And if the board could not directly by any dispatch originating with themselves have authorized such an allowance, which they could not for the reasons above stated, neither can they indirectly do it by altering the dispatch of the Court of Directors.

LORD ELLENBOROUGH C. J. The first question is, whether for the objection which is now made under 33 G.3. c. 52. s. 16. to the authority of the board of controul, it is not incumbent on the Court of Directors to apply by way of appeal to the privy council, which is constituted by that clause the tribunal to exercise a visitatorial jurisdiction over any orders or instructions to be sent by the board, which, in the opinion of the Court of Directors, do not relate to the civil or military government or revenues in *India*. And the Court, I believe,

lieve, have no doubt that this is an objection which the Court of Directors ought to submit to the decision of the privy council, and that as far as we are concerned, it is perfectly *alieni fori*, and upon which we therefore sedulously abstain from pronouncing any opinion. And with a view to facilitate the decision upon it, the Court, which is only suppletory to the defects of other jurisdictions, will now enlarge this rule, in order to see that such appeal be made. But a second objection has been pressed, which is founded upon two other clauses of the act of parliament, within one or other of which it is said, the board of control is prohibited from giving any such direction as the present. Now by s. 18. it is enacted "that it shall not be lawful for the board to give any direction for the payment of any extraordinary allowance or gratuity from the said revenues to any person on account of services performed in *India*, or on any other account whatever," &c. The question is, whether this is a direction for the payment of *an extraordinary allowance or gratuity*, within the true intent of those words, as they are found in this clause. The true meaning of them may be collected from other words which are in company with them. For we find that by s. 17. the board of control is restrained from giving "any directions ordering or authorizing by any dispatch the increase of the *established salaries, allowances, or emoluments*, of any governor, &c., or of any other officer in the service of the Company, beyond the amount fixed by the present orders, unless such increase be specified in some dispatch proposed by the Court of Directors," &c. By this enactment the board of control is precluded from increasing *the established salaries, allowances, or emoluments*. Now what do these words mean? It is plain that they mean the usual permanent advantages

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attached to the several offices, and permitted to be received by the officers there specified. Is this an increase of any allowance of that nature, that is, of the ordinary and understood advantages belonging to any of those situations? I cannot agree that it is, since it seems to me to be nothing more than a compensation to be made to an individual for a quantity of grain taken by the Company; for though the individual was an officer of the Company, it is not an allowance to be made to him in that character. Then upon the meaning of the words *allowance or gratuity* in s. 18. within which those who resist this rule must shew this compensation to be, it is not difficult to perceive that the object of this clause was to restrain the board of control from doling out the revenues of the Company against their consent; and if we saw that what has been done was, under pretence of making compensation to an individual, really done with a view of making him an extraordinary allowance or gratuity, we would strip the transaction of its cover and look at it in its naked form, and not give effect to it by granting the mandamus. But the Court have no reason for viewing it in that light. There is another thing which shews that such a compensation as this is not an allowance or gratuity within the meaning of the act; for the act provides that an account of such allowances or gratuities shall be added to the next list of establishments laid before parliament. How could such a compensation as this be added to the list of establishments laid before parliament? It is a thing that is to occur but once, and therefore is not a matter properly belonging to the list of establishments. It is in the nature of a liquidation of damages for a trespass done, or an ascertainment of the value of grain taken by the Company, being the property of an individual, and has nothing of that

that character which belongs to the words *allowance or gratuity* in s. 18. For these reasons it seems to me that we are not interdicted by any of the provisions of this act of parliament which have been brought forward in support of the 2d objection from giving effect to this order of the board of control. But inasmuch as the 1st objection, namely, that this is an order which does not relate to a point connected with the civil, or military government, or revenues, is an objection that is peculiarly for the privy council to decide upon appeal: the Court will enlarge this rule for the furtherance of that appeal.

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LE BLANC J. With respect to the second objection, I think that the mode of payment proposed by the Court of Directors, shewed that they considered this as a debt due from the Company to the individual, and thus it came before the board of commissioners as a question in what manner the compensation should be calculated. Therefore I do not see how it comes within either of the two clauses referred to as an allowance or gratuity. If I could discover that this was an indirect mode of giving an officer of the Company an allowance or gratuity, I should go along with the arguments in support of this objection. How far this may come within the former clause this Court has nothing to do with, because it is a subject for the decision of another forum.

Per Curiam,

Rule enlarged. (a)

The Attorney-General, The Solicitor-General, and Abbott were in support of the rule.

(a) Afterwards the Court of Directors appealed to the privy council, who determined against the appeal; and the same being signified to the Court in a subsequent term by Mr. Attorney-General, the rule was, upon his prayer, made absolute.

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Friday,
June 9th.The Master, Wardens, and Assistants of the
TRINITY-HOUSE *against* CLARK.

Where defendant chartered his ship to the Commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages from Deptford to foreign ports and back, held that by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the crown, so that defendant during the time of such service, was not to be considered as owner within the charters granted to the Trinity-House, which impose light-house duties, and for buoyage and beaconage, on the masters and owners of ships.

ASSUMPSIT for toll and duties claimed to be due from the defendant, as owner of the ship *Britannia*, on account of the ship's having passed or crossed certain lights, buoys, and beacons, in certain foreign voyages made between the 29th of *October* 1807, and the 6th of *August* 1809. Plea, non assumpsit.

At the trial before Lord *Ellenborough* C. J.; at the *London* sittings after *Hilary* term 1814, there was a verdict for the plaintiffs for 15*l.*, subject to a case, which stated that the plaintiffs claimed these duties in respect of the following lights, viz.: *The Goodwin Lights, Owers Light, Needles, Portland, Caskets, Lizard, Scilly, and Nore*, and in respect of the buoys and beacons on coming up and entering the *Thames*; all which duties they claimed by virtue of the statutes, charters, and patents, severally relating to them, the particulars of which were subjoined to the case; and the said duties were reasonable in amount, provided the defendant was by law liable to pay them. The defendant, who was owner of the ship, on the 28th of *October* 1807, chartered her to the commissioners of the transport service on behalf of His Majesty, by charter-party, a copy of which was likewise subjoined. In the course of the ship's employment as a transport under this charter-party, she sailed from *Deptford* to *Malta* and other places in the *Mediterranean*, and returned to *Deptford*, from whence she again sailed to *Cadiz* and *Gibraltar*, and returned to *Deptford*, and had the benefit of the
said

said lights, buoys, and beacons. The ship during this employment neither reported inwards nor cleared outwards at any of His Majesty's custom-houses. The question was, whether the defendant was liable under these statutes, charters, and patents, to pay the plaintiffs all or any of the tolls and duties claimed in respect of this ship while she was thus employed under the charter-party. If he was liable to all or any, the verdict to stand for the whole sum or for so much; if he was not liable to any part, a nonsuit to be entered. And the case was to be made a special verdict at the desire of either party, and with the approbation of the Court.

This case was argued in the last term by *Holroyd* for the plaintiffs, and *J. Parke* for the defendant, and two points were made for the defendant, 1st, That the Crown was during the period of this ship's employment under the charter-party, to be considered as the owner of the ship, and therefore by the several charters and patents, which, with the exception of the *Scilly* charter, imposed these duties upon the master and owner, and could not be extended to charge the crown, this ship was exempt from these duties; or at all events the defendant was not liable to pay them. 2dly, That the charters, &c. or most of them, contemplated, that in all cases in which these duties were to become payable, the ship was to clear outwards or report inwards, wherefore in this case, where the ship neither cleared outwards or reported inwards, these duties were not payable. The argument on the 1st point turned chiefly upon the effect of the language of the charter-party, coupled with a consideration of the particular nature and exigencies of the service contracted for under it, to convey this ownership to the crown; and it was contended that its effect

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was such as to pass the temporary ownership; and *Valleio v. Wheeler* was cited (a). To which it was answered, that the crown had under this charter-party, as would have been the case with any other charterer, merely the use, and not the ownership of the vessel; and that the defendant had derived the benefit from these lights and beacons by the additional security afforded to the ship, the loss of which by the perils of the seas would have been his loss, and not that of the crown; and *Rex v. Jones* (b) was cited, particularly for that part of the opinion expressed by the Court, that where “ transports are contracted for by the navy board, on freight to carry troops, or for other purposes, it never was considered that the property in them was transferred to the crown, though the masters were subjected to a certain degree of discipline while engaged in the service.”

The Court, after taking time to consider, determined the case upon the 1st point, and in delivering judgment went fully into the arguments upon that point, and stated so much of the several documents referred to in the case, as is necessary for a right understanding of their determination.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court. This is an action of indebitatus assumpsit by the Corporation of the *Trinity-House* against the defendant, as owner of the ship *Britannia*, for certain light-house duties granted to them by several charters, and for buoyage, and beaconage on entering the river *Thames*. The charters impose the light-house duties on the masters and owners

(a) *Cowp.* 143.(b) 8 *East.* 459.

of ships, except that of *Charles* the 2d for the *Scilly* lights, which grants a reasonable allowance without fixing any precise rate, or saying by whom it shall be paid. The buoyage and beaconage are claimed under a grant of those offices, with all accustomed fees, made to the plaintiffs by Queen *Elizabeth* in the 36th year of her reign. All these charters, except those of *Charles* the 2d and Queen *Elizabeth* above-mentioned, contain an injunction to all officers of the customs not to give any vessel a cocquet or discharge, if they do not produce a certificate of payment of these duties; and they also give the officers of the *Trinity-House* a place in all the custom-houses where the collection is made. And all the charters, except the two above-mentioned, and that of 7 *Geo.* 2. for the *Nore* light, direct that the duties on outward bound ships shall be paid before their clearing outwards at the custom-house. All the duties are stated to be reasonable, if the defendant is liable to pay them. The ship *Britannia* was in the service of the crown, during the voyages for which these duties are claimed under a charter-party, dated 28th *October* 1807. The three latest of these charters for the *Goodwin*, the *Owers*, and the *Needles* lights, “except, in terms, ships or vessels belonging to His Majesty;” and it is properly admitted that such ships cannot be charged to the duties under any of the other grants, though they do not contain such express exception; such exception from tolls being to be implied in the case of His Majesty. It seems also that there is no distinction in reason between vessels of which the King has a temporary ownership, and those which were built in the Dock-yards of the Crown, if it appears that the King was the owner during the voyage for which the duties are claimed.

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And this brings the question between the parties to this single point; was the King, or the defendant, the owner of the *Britannia* within the meaning of these charters, during these voyages in which the *Britannia* was certainly in the service of the Crown. This must depend upon the terms of the charter-party, which it will be proper to state with some particularity. It bears date the 28th *October* 1807, and is made between Messrs. *John Clark and Sons*, on behalf of the owners of the ship *Britannia* of *North Shields*, then in the *Thames*, of the one part, and the commissioners for conducting His Majesty's transport service, for and on behalf of His Majesty, on the other part. It contains in substance that *John Clark and Sons*, on behalf of themselves and all the part-owners of the said ship, granted and to hire and freight let the said ship to the said commissioners, to receive on board, at such ports as should be directed in the *European* seas, not eastward of *Gibraltar*, all such soldiers, horses, women, servants, arms, ammunition, provisions, stores, or whatever else should be ordered to be put on board her, at such ports as should be required, and after having landed the said soldiers, horses, and stores, to receive on board such others with their baggage, &c. as should be put on board her, and proceed therewith as she should be directed. The ship was to continue in pay for three months certain, and after that for so long a time as the commissioners should require, and until they or their agents should give notice of discharge at *Deptford* or *Portsmouth*, after the ships arrival at one of those places, and the said commissioners for and on behalf of His Majesty, hired or retained the said ship or vessel for the said time and service accordingly. There then follow covenants from the

the owners that the ship should be in good condition, and should be well provided with certain articles there enumerated, should be manned as therein specified, be provided with powder and shot, and with victuals for the men, comprising the complement of the ship during the said service and employment; that they should have proper apparatus for dressing the soldiers' victuals and things fit for serving them out, and for drawing and serving water to the horses; that the master should receive on board the said ship from time to time, such a number of soldiers, horses, provisions, provender, or any naval or victualling stores, recruits, &c. for the service of His Majesty, as he should be directed, and as he could reasonably stow, and proceed with them to such places in the *European* seas as he should be directed, under such convoy as the commissioners or officers in chief, whose command he should be under, should direct, and land and deliver the same, and so from time to time, during his continuance in the service; in the performance of which the said master and his men, with his boats, should be aiding and assisting to the utmost of his power; that he should sign receipts, keep a log-book, and deliver it on oath, if required, at the transport office, and give them immediate notice of his arrival at any port. In consideration of which covenants, &c. the commissioners covenanted for the King, that the said *J. Clark* and Sons should be allowed for the hire and freight of the said ship 20s. a ton each calendar month for the register tonnage, for so long a time as the ship should be continued in His Majesty's said service; which freight or pay should commence, on producing a certificate from the inspector of the ship's being ready to sail, as far as the owners were

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concerned, and the same should cease and determine at the time of her discharge. The owners were to have a month's freight in advance, and after the ship should have been in the service three months, they were to have a second month's pay on producing a certificate in the following form; "These are to certify the commissioners for conducting His Majesty's transport service, that the transport master, tons, is at this time in His Majesty's service, fit for the service employed upon, and complete according to charter in men and stores, and that the master has behaved himself properly, and was always obedient to command during the time he has been under my directions." "Given under my hand," &c. and afterwards they were to have two months' pay when eight months were due, so as to have always six months in arrear for the security of government; and such issues of two months' pay were to be made, on producing from time to time such certificates as aforesaid, not only of the service of the said ship during the time aforesaid, but also that the same was safe at the expiration of the times of such service respectively. The commissioners were to have power to make such abatement in the freight as they should think reasonable, in case of the ship's inability to proceed from deficiency of men or stores, or any other cause or accident, (it being to be understood, that the owners generally warranted the use of the said ship from any defects or deficiencies of any kind.) If the ship should be taken by the enemy, burnt, or sunk during the said service, without the master's or crew's fault, she was to be paid for by the Crown at an appraisement. The officers were to be accommodated with the great cabin, and other cabins

of the ship, except the starboard state-room, which was to be reserved for the agent of transports on board, or for any other purpose the said commissioners might direct, and also a proper cabin for the master, and a small one for the mate, and that the gun-room, fore-castle, and steerage, or such part thereof as should be necessary, should be reserved for lodging the seamen.

We do not think that any argument arises in this case, from the benefits which either party may derive from these lights; each is interested and derives a benefit from them; the Crown, in respect of the lives and preservation of the men and horses, and the provisions and stores; the proprietor of the ship, in respect of the existence of the vessel; and this, whether the possession remains with them, or is transferred to the Crown, during the term stipulated for. Nothing is stated as to the rate of freight, which can throw any light on the question. The Crown and the proprietors of the ship must be taken to have contracted with each other, upon the knowledge of their respective legal rights. The charter-party "grants" the ship, and "lets it to hire and freight," which are proper words of lease, and would of themselves pass the possession. The purpose is mentioned, but this mention of the purpose does not restrain the possession, though it may restrain or qualify the use of the thing let to hire. If I hire a stable or coach-house, as such, I have not less the possession, because it might be a breach of the terms of hiring to use either as a shop or warehouse. In this case the purpose rather calls for the possession, as it seems to require such a control over the ship as can only be had by possession. A certain term of this hiring is fixed, and a prolongation beyond that term at the pleasure of the hirers, till they

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they determine it under certain circumstances. The commissioners are also stated to have “hired or retained the ship for the said time and service,” and that, at a certain tonnage rate by the month. The payment of the freight or hire, after the first advance, is agreed to be made on producing a certificate, the terms of which seem to imply the possession to be in the Crown, “to be at this time in the service of His Majesty,” (not merely “to be ready, or under contract to perform the covenants entered into with His Majesty for the service,” and which His Majesty might, under these covenants, require to be performed;) and the mode of the future payment is settled on similar certificates; and according to this notion, the proprietors of the ship are said “to warrant generally the use of the said ship.” From all which expressions in the instrument, and from the nature of the service stipulated for, which is of the utmost importance, and might be delayed, and even frustrated, if the Crown was not authorised to take possession of the ship to secure its immediate execution, but was left to a bare action of covenant against the proprietors of the ship, if they were to refuse to permit their ship to sail, it is contended that the Crown had an executed right of possession in, and was legally and actually possessed of the ship, and owner thereof, within the meaning of these charters, during the period in which the services were performed, which gave rise to these claims. Against this it is urged, that the use and service only of the ship are parted with, and that the possession and ownership are retained by the conduct and navigation being left to the master and crew, who are the servants of the proprietors of the ship, chosen, and fed, and paid by them; that the destination of the ship is with the Crown, but

that the mode of executing the orders of the Crown, is intrusted to the proprietors of the ship, by the means of their servants, the master and crew, over whose conduct, if they execute those orders, the Crown has no control. That, though the whole tonnage is hired, yet, if it be not used by the Crown, the proprietors of the ship would be entitled to use it for their own advantage, in any way which would not impede the performance of the stipulated service, (though it is not very easy to conceive a perfectly unexceptionable case of this sort.) That the only remedy the Crown would have on the refusal of the proprietors of the ship to perform their contract, and permit their ship to sail, would be an action on the charter-party. We are however of opinion, that the arguments tending to shew that the possession passed to the Crown, during the term and service of the ship, outweigh those which lead to the contrary conclusion. It is evident that the service contracted for, is of the highest importance to the country, and that its most valuable interests may depend upon the immediate execution of such service as this charter-party authorizes the Crown to require, and the proprietors of the ship agree to perform. Whatever construction of the contract enables the Crown to enforce a prompt obedience to its terms, must be most agreeable to its spirit and intent. If the proprietors of the ship, from whatever motive, were authorized to insist that the officers of the Crown had no right to enter the ship, but were driven to their action on the breach of the contract, infinite and irreparable mischief might be done to the public service by the delay. No mischief that we can foresee will ensue from holding that the Crown has a right, under this charter-party, to have the temporary
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possession of this vessel, which must materially assist in securing the performance of the service contracted for, if the parties or their servants should be unwilling, from any cause, to comply with the contract. We do no violence to the words of the instrument by putting this construction upon it. The terms are proper terms of grant and demise, the sum to be paid is in the nature of rent for the use of a chattel, the whole use of the ship is warranted, the term is sufficiently fixed, and the certificates which the parties are to procure to entitle them to the rent, are worded so as to recognize the possession. In truth the supposed reservation of the possession to the master and crew is not exclusive, as is contended for. The occupation of the different habitable parts of the ship is arranged by the terms of the contract, and a place provided for the residence of the agent for the Crown. The whole argument appears to rest on a fallacy; the possession, such as it is, of the master and crew, is not retained by the proprietors of the ship, to restrain or interfere with the full and free use of the ship, which they have let to hire for a term, but as subsidiary and subservient to such use. It is not only consistent with the entire ownership and possession of the vessel on the part of the Crown during the period for which it is let, but it is a farther means provided to enable the Crown fully and beneficially to enjoy the same, by letting at the same time out to the Crown the services likewise of those by whom the vessel might be best conducted under the direction of the Crown, in the prosecution of the object for which the Crown hired it. The vessel therefore is not only hired, but along with it the services also of a certain number of persons paid by the proprietors, and these services
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are necessary to the use of the vessel, which the proprietors have expressly warranted to the Crown. It is the same thing as the hire of a waggon and team for a certain term, the proprietor of the waggon stipulating that the waggon should be driven, and the horses taken care of, by his own waggoner and boy, whom he was to feed. In such a case it could hardly be made a question that the waggon and team were in the possession of the hirer, during the harvest, or whatever the term might be for which they were hired. This is indeed *idem per idem*, but as the instance is more familiar, it serves to put the point in a clearer light. It may be proper to take notice of two cases which were cited, rather for the purpose of shewing, that they do not apply to the present point, than to derive any assistance from them. The first is *Rex v. Jones*, 8 East, 451., which decided that the packet-boats between *Holyhead* and *Dublin*, were rateable to the poor, and that the Crown was not to be considered as the owner. That case is distinguishable from the present, in many very important particulars. There was no charter-party there, no destined term of service. The captains had a salary; if they did not perform the service to the satisfaction of the Crown, they would at any moment cease to be employed, and their salary would immediately cease; they were barely to carry the mail, which of course would occupy little of the vessel's tonnage: the rest of the tonnage and the advantage to be made of it were wholly with them, except on some very particular occasions. Mr. Justice *Lawrence*, in giving his judgment on that case, expressly distinguishes vessels under charter-party from those which are not so. The other case is *Valleio v. Wheeler*, Cowp. 143. which was cited as establishing the

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the doctrine, that the charterer of the ship is the owner *pro hac vice*. As a general proposition this is hardly denied on the present occasion, but the precise point made here is, that this case is an exception to the general rule, because by the terms of this charter-party, the appointment of the crew and the navigation of the ship are not transferred to the charterer, but left with the proprietor; as to which we have already given our opinion. The reasoning in *Valleio* and *Wheeler* must be applied to the question agitated in it, viz. against whom barratry may be committed. Whether any act of the master or crew in the present case could be barratry as against the commissioners, need not be decided, or even discussed, upon the point now before the court. The only question is, who is to be considered as owner of the vessel within the charters under which the plaintiffs claim, during the time she was in the service of the Crown under this charter-party. We are of opinion that from the terms of the contract, and the nature of the service to be performed, the Crown is to be so considered, and that a nonsuit must be entered.

Friday,
June 9.

DOE, on the Demise of BYNE and Others, *against*
BREWER and Another.

The lessor of
the plaintiff in
ejectment, can-
not release the
action.

IN ejectment on the separate demise of *Byne*, and in another count on the joint demise of *Wade* and *Lodge*, the defendants, after not guilty and issue thereon, plead in bar at the assizes a release *plais darrein continuance*, by *Lodge* to the defendants, of
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this action, and all costs relating thereto. Demurrer. Joinder. And now the question was, whether this release was good.

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Bolland, who was called upon by the Court to support the plea, contended that the release was good as a bar to the action upon the joint demise of *Wade* and *Lodge*. For the plaintiff in this action is but a nominal person, and of this the Court will take notice, and also that the lessors of the plaintiff are the only persons concerned in interest; and if so, this being a release by one of two joint lessors, is good against the other. That the lessor of the plaintiff is substantially the party, and the only party to the suit, was considered by Lord *Mansfield* in *Aslin v. Parkin* (a). And so per Lord *Holt* (b) the plaintiff is merely nominal, and trustee for the lessor, and if he release the action, may be committed; and according to *Moore v. Goodright* (c) to assign his death for error is a contempt. So *Payne v. Rogers* (d), shews that the Court will look to the real plaintiff, though he be not the plaintiff upon record, as if a landlord sue in the name of his tenant, and the tenant release to his prejudice. Now here the plaintiff is altogether a fictitious person, and the mere creature of the Court.

LORD ELLENBOROUGH C. J. I remember a case like this very early in my professional life, where a release given by the lessor of the plaintiff was pleaded. The case was argued by *Kirby* Serjt. who maintained that

(a) 2 Burr. 667.

(b) Salk. 260. pl. 15.

(c) 2 Str. 899.

(d) Dougl. 407. 4th edit.

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the release ought to have been by the nominal plaintiff. I confess I thought the demurrer well founded, but I believe at that time it struck Lord *Loughborough* otherwise. However I still think the objection a valid one, and that the lessor of the plaintiff is not the person to release. Looking to the record, we must consider those as real parties to the action who are parties upon record, and the real parties alone are qualified to release the action. For this purpose the action must be taken with all its consequences as if it was really pending between these parties. For other purposes indeed we treat it, as it really is, a fictitious action (a), but as matter upon the record it must be taken as if really between the parties to it.

Bayley J. In *Aslin v. Parkin* Lord *Mansfield* was not considering how the matter stood as between the parties upon the record, but independently of the record. But as it regards the record we must consider *John Doe* as the real party.

Per Curiam,

Judgment for the plaintiff.

Marryat was for the plaintiff.

(a) See 3 *Barr.* 1290.

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ANDERSON and Others *against* HEATH and Others.Friday,
June 9th.

ASSUMPSIT by the indorsees against the defendants as acceptors of a foreign bill of exchange for 2000*l.*, drawn by *F. A.*, payable 60 days after sight to the order of *C. and Co.*, and indorsed by them to the order of the Plaintiffs. Plea, general issue. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Michaelmas* term, there was a verdict for the plaintiffs, subject to the opinion of the Court upon a case, which was this :

The bill was remitted to the plaintiffs, who were merchants in *London*, indorsed as above, by *C. and Co.* from *Malta*, and the plaintiffs on the 2d of *August* 1814 presented it to the defendants, also merchants in *London*, trading under the firm of *Heath and Co.*, for acceptance, who refused to accept it, and thereupon the plaintiffs protested it for non-acceptance. On the 4th of *October* following the plaintiffs sent their clerk to present the bill to the defendants for payment, and he presented it accordingly, with a memorandum annexed to it of the expence of the protest, amounting to 17*s.* 6*d.*, and likewise of a duplicate of the protest amounting to 17*s.* The defendant *Furse* then said to the clerk, " This bill will be paid, but we cannot allow you for a duplicate protest." To this the clerk answered, that the charges were what they considered usual and necessary, and that he could not receive payment of the bill without the charges, without farther orders. The clerk then went back to the plaintiffs for instructions, and returned to

Where the holders of a foreign bill of exchange, payable 60 days after sight, presented it to the drawees for acceptance, which being refused, they protested it for non-acceptance, and afterwards, on the day when it became due, presented it to the drawees for payment, making a charge for the expences of protesting it, to which the drawees said, " This bill will be paid, but we cannot allow you for a duplicate protest," and the holders refused to receive payment without the charges, and afterwards the drawees revoked their offer to pay : Held that they might well do so, for this did not amount to an acceptance of the bill by the drawees.

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the defendants' counting-house in about half an hour, when the defendant *Furse* told him that since he had last called, they had received a letter informing them that the drawer of the bill had suspended his payments, and therefore they could not pay the bill. The plaintiffs afterwards again demanded payment of the bill from the defendants, who refused to pay. If the plaintiffs were entitled to recover, the verdict to stand; if not, a non-suit to be entered.

Richardson for the plaintiffs argued, that a bill of exchange may be accepted by parol; as if a merchant say, Leave the bill with me, and to-morrow I will accept it; this amounts to an acceptance (*a*). Also an acceptance may be made after the time appointed for the payment of the bill is past; as if after the time of payment the bill be shewed to the drawee, and he promise to pay it, generally; or if he promise to pay according to the tenor of the bill, it shall be a good acceptance, although the time being past it is impossible to pay according to the tenor; for it is an acceptance to pay presently (*b*). So in the case at bar, the promise by one of the defendants that the bill would be paid, at a time when the bill was already due, was a promise to pay generally, and therefore is an acceptance, for it is an acknowledgment by the defendants at that time that they had funds in their hands of the drawer sufficient to pay the bill. If then the acceptance were once complete it could not be revoked; and there has been no waiver of it, as in *Bentinck v. Dorrien* (*c*), by afterwards

(*a*) *Gilb. L. E.* 115.

(*b*) *Jackson v. Pigott*, 1 *Ld Ray.* 364. *Salk.* 127. *Carth.* 459.

(*c*) 6 *East*, 199.

protesting the bill. And the refusal to allow for the duplicate protest was not put as a condition that if the demand were persisted in the bill should not be paid; all parties agreed that the bill should be paid, only they differed as to the payment of a collateral charge. Neither is it less an acceptance because it was made at a time when the bill was presented for payment, and not for acceptance.

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LORD ELLENBOROUGH C. J. In this case the defendants had, as it were, commenced the work of discharging the bill, and were on the very brink of paying it, when the subject of the charge for the duplicate protest is started, which causes them to hold their hand. But at this time neither of the parties were treating about accepting the bill, nor was it ever mentioned or contemplated by them: all that was thought of was the payment of the bill. If therefore this could enure as an acceptance, it would enure against the plain intent of the parties. It is undoubtedly true that if a merchant upon being applied to for his acceptance, uses words which import a promise to pay the bill, this will amount to an acceptance; but it is not so where the words are used upon a different occasion and with a different intent. Now in this case all that was ever contemplated was payment, and as to that the defendant says, if you will take the amount of the bill it shall be paid, but if you choose to insist upon having the 17s., I will not pay it. Not one word passes about acceptance, and the party unfortunately elects to stand upon his claim to the 17s., but for which he would have been paid.

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LE BLANC J. To hold this an acceptance would be to hold it something which was never intended by the parties.

Per Curiam,

Judgment of nonsuit.

Reader was for the defendants.

Friday,
June 9th.

BURGESS *against* CLEMENTS.

An innkeeper is not answerable for the goods of his guest, which are lost through the negligence of the guest, out of a private room in the inn chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper, who at the same time told the guest that there was a key, and that he might lock the door, which he neglected to do.

CASE against an innkeeper upon the custom of the realm for not safely keeping the plaintiff's goods in his inn, per quod they were stolen. Plea, general issue. At the trial before *Richards* B., at the last *Oxfordshire* assizes, the case was that the defendant kept a common inn at *Oxford*, and the plaintiff, who was a *Birmingham* factor, and travelled for orders, and was used to frequent the inn, came there on the 23d of *December*, about two o'clock p. m., bringing with him three boxes. He was shewn into the travellers' room, as usual, and his boxes were deposited there, but shortly afterwards he spoke to the wife of the defendant, and desired to have another room, pointing to it up some steps, as he said he wanted to shew his goods. This was what they called a private room, and the wife told him that he might have it, that there was a key in the door, and that he might lock the door. His boxes were accordingly removed into the room, and after dining in the travellers' room, he also went into it, and drank his wine. In the afternoon, a customer calling, the plaintiff opened the boxes, and displayed his goods, which consisted chiefly of jewellery goods, upon a table, and the customer made some purchases. While they were

were thus engaged, the door of the room was twice opened, and a stranger looked in each time, who begged pardon, and immediately withdrew and shut the door, upon which the customer suggested the propriety of bolting the door, in order to prevent interruption. About seven o'clock the customer went away, leaving the plaintiff packing up his things, and soon afterwards the plaintiff left the room and went out, and did not return until about nine o'clock, when it was discovered that two of the boxes were missing. The door of the room opened into the gateway which led to the street, and there was a key in the lock on the outside, but when the plaintiff went out he did not lock the door, nor did he know that he ever shut it. The learned Judge stated the law to the jury to be this, that an innholder was *prima facie* answerable for the goods of his guest in his inn, but that a guest might by his own conduct discharge the innholder from his responsibility. And he left it to the jury to determine whether under the circumstances of this case the Plaintiff had not discharged the Defendant, and if not, to find the value of the goods lost. The jury found for the Defendant.

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Jervis moved for a new trial in the last term, on the ground of a misdirection; for this he said is contrary to *Calve's* case (a), by which it appears that an innkeeper is bound in law to keep his guest's goods safe without any stealing or purloining, and it is no excuse for the innkeeper to say that he delivered the guest the key of the chamber door in which he is lodged, and that he left the chamber door open.

(a) 8 Rep. 33.

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Dauncey, and *W. B. Taunton*, shewed cause, and argued that this action did not lie. For an action lies not in every case, against an innkeeper, for goods lost at his inn; as if a man be at an inn as a neighbour, or friend, and not as a guest, he shall not have this action. Or if the guest be robbed by his own servant, or companion, or by any one whom the guest desires to be lodged with him, or if the goods be lost without any fault of the innkeeper, an action lies not. And all this appears by *Calye's* case (a), and by the words of the writ, which regard only common inns, and such passengers as are *in eisdem hospitantes*, and such losses only, as happen *pro defectu hospitatorum seu servientium suorum*. Now, 1st, the plaintiff was not a guest, or person *hospitans*, within the meaning of that word; for he had a chamber assigned to him at his own request, and not by the assignment of the innkeeper, who, if it had been left to him, might have assigned one more secure; and the purpose for which the chamber was assigned to him was special and different from that of an ordinary traveller, viz. that of exhibiting his goods; and he also had the key given him, and took on him the custody of the goods; in like manner as in the *East India Company v. Pullen* (b), the company were held to have taken on them the custody of the goods so as to discharge the common carrier. And if a man hire a chamber in an inn, otherwise than as a guest, he is not within the meaning of this writ (c). *Bennet v. Mellor* (d) only decided that an innkeeper who receives a guest with his goods is chargeable if they be

(a) 8 Rep. 32.

(b) 2 Str. 690.

(c) See *Moore*, 877.

(d) 5 T. R. 273.

lost

lost in the inn, though he had before refused to receive the goods. 2dly, Supposing the plaintiff in this case to have been a guest, yet it is through his neglect that the goods were lost; for after being told to lock the door, and after having his attention called to the appearance of the strangers at the door, he ought not to have gone out leaving the door not only unlocked but open. Therefore this is a loss arising from the plaintiff's own fault, and not *pro defectu hospitatoris*.

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Jervis and *Manley*, *contra*, maintained that the law had not been correctly stated to the jury; for it was plain that the plaintiff was living and dieting at the inn in all respects as a guest, and it is in consideration of the benefit which the innholder derives from this, that the law makes him chargeable. And here was no special acceptance on the plaintiff's part, either of the custody of the goods, or of the key of the chamber, and it appears by *Moor*. 78. that the Defendant could not discharge himself by tendering the key of the chamber to his guest, nor according to 42 *Ed.* 3. 11. (a), 11 *H.* 4. 45. (b), even if he had delivered the key to him.

LORD ELLENBOROUGH C. J. I cannot see any thing to impeach the propriety of this verdict. Perhaps the facts of the case might have been commented on more at large, and most probably the learned Judge did comment on them at the trial to a greater extent, and more completely using his own province, and less devolving it on the jury, than appears by the limited statement of a report. But the question here is whether

(a) *Bro. Abr. Action sur le Case*, pl. 15.(b) *Ibid.* pl. 41.

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the jury in finding this verdict, have not rightly exercised their province. Now the law obliges an innkeeper to keep the goods of persons coming to his inn, *causâ hospitandi*, safely, so that in the language of the writ, *pro defectu hospitatoris hospitibus damnum non eveniat ullo modo*. And I do not say that if the goods be stolen from the inn, it is not *primâ facie* to be taken as happening through the fault of the innkeeper. But there can be no doubt also that there may be circumstances, as if the guest by his own neglect induces the loss, or introduces himself the person who purloins the goods, which form an exception to the general liability, as not coming within the words *pro defectu hospitatoris*, and under such circumstances the plaintiff shall not complain of the loss. Now let us first consider whether the plaintiff came to this inn *causâ hospitandi*, and 2dly, whether by his conduct he did not induce the loss. It does not appear whether he had a sleeping room, but we may, I think, presume that he had, apart from the travellers' room: but he desires to have a private room up some steps, in order to shew his goods. Now an innkeeper is not bound by law to find shew rooms for his guests, but only convenient lodging rooms and lodging. As to what is laid down in *Calye's case*, respecting the delivery of the key to the guest, it plainly relates to the chamber door in which he is lodged. And I agree that if an innkeeper gives the key of the chamber to his guest, this will not dispense with his own care, or discharge him from his general responsibility as innkeeper. But if there be evidence that the guest accepted the key, and took on himself the care of his goods, surely it is for the jury to determine whether this evidence of his receiving the key proves that he

did it *animo custodiendi*, and with a purpose of exempting the innkeeper, or whether he took it merely because the landlord forced it on him, or for the sake of securing greater privacy, in order to prevent persons from intruding themselves into his room. The cases shew that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant or companion whom he brings with him. For thus it is laid down in *Calve's* case, "that if the servant of the guest, or he who comes with him, or he whom he desires to be lodged with him, steal or carry away the goods, the innkeeper shall not be charged; for there the fault is in the guest to have such companion or servant;" which shews that for such damage as is occasioned by the misconduct of the guest, he shall not be entitled to complain or to have any recompence. Now what is the conduct of the plaintiff in this case? The innkeeper not being bound to find him any more than lodging and a convenient room for refreshment, this does not satisfy his object, but he inquires for a third room, for the purpose of exposing in it his wares to view, and of introducing a number of persons, over whom the innkeeper can have no check or control, and thus, as it seems to me, for a purpose wholly aliene from the ordinary purpose of an inn which is *ad hospitandos homines*. Therefore the care of these goods hardly falls within the limits of the defendant's duty as an innkeeper. Besides after the circumstance relating to the strangers took place, which might well have awakened the plaintiff's suspicion, it became his duty, in whatever room he might be, to use at least ordinary diligence, and particularly so as he was occupying a chamber for a special pur-

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purpose. For in general though a traveller who resorts to an inn may rest on the protection which the law casts around him, yet if circumstances of suspicion arise, he must exercise ordinary care. It seems to me that this room was not merely entrusted to the plaintiff in the ordinary character of a guest frequenting an inn, but that he must be understood as having taken a special charge of it, and that he was bound to use ordinary care for the safe keeping of his goods, and that it is owing to his neglect, and not to the fault of the innkeeper, that the loss has happened. And this was a question which it was proper to leave to the jury.

LE BLANC J. I agree with my Lord that there ought not to be a new trial in this case. We must take the facts from the report, and also that the Judge stated to the jury that an innkeeper was responsible to his guest for the safe custody of his goods, but that the guest might by his own conduct discharge the innkeeper from that responsibility. The only question then is, whether the jury were justified under the circumstances of this case, in finding that the guest had so discharged the innkeeper. There can be no doubt as to the liability of an innkeeper, to look to the safe keeping of every person's goods who comes to his inn as a guest, and negligence will be imputed to him, where the loss is not to be ascribed to any other known cause. Now in this case the plaintiff came originally as a guest, and was shewn into the travellers' room; but it is a material part of this case that he afterwards applied to the innkeeper for a room for another purpose, and not in the character of a guest, but for a particular room in which he might shew his goods. The innkeeper's

keeper's wife's assent to this application is accompanied with that which is equivalent to telling him, that he must take charge of it; for she says, You may have the room, there is a key in the door, and you may lock it. Surely this was equivalent to saying, I will let you have the particular room you have fixed upon for shewing your goods in, but then it must be upon condition that you take the custody of it yourself. If he had declined this condition, might not the wife fairly have refused to let him have the room for shewing his goods? But he says nothing, but has his boxes moved into the room, and afterwards they are stolen out of it, clearly in consequence of the door being left open. It seems to me that this is consistent with the principle of law laid down in *Calve's* case, and other cases, for the place to which that principle was applied is not a room which the guest has selected for some particular purposes, but the chamber in which he is lodged as a guest; and there it is certainly true that the innkeeper is not excused by saying that he delivered the key to the guest, and that he left the chamber door open. This may well be, and yet in this case, where the guest applied for the room for a different purpose from that of being lodged there or entertained, the innkeeper may not be responsible. I think therefore the jury were justified in determining that he received the favour *cum onere*, that is, that he accepted the chamber to shew his goods in upon condition of taking his goods under his own care.

BAYLEY J. I agree that the verdict was right, and that any other would have been wrong; inasmuch as the plaintiff has by his own conduct superseded for the time

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time the obligation of the innkeeper. The plaintiff applied for a room to exhibit his goods in, and not for any purposes as a guest: the mistress had a right to refuse complying with the application for such a purpose, or she might grant it *sub modo*, and upon such terms as she might think proper to prescribe. It appears that she did prescribe terms, and the plaintiff accepted them, for she told him, he might have the room, that there was a key, and he might lock the door; and he assents, because he does not object to these terms, but takes the room. That I think implied an obligation upon him to lock the door of the room, when he left it, or at least to make some communication to the mistress, that she might know when her liability was to revive. For after a person has specially taken his property into his own care, it is but reasonable, if he means to charge the innkeeper upon his responsibility, that he should apprise him of it. This then is the case of a person at an inn who requests a chamber for a special purpose, which request is granted upon a condition to which he must be taken to have assented; he removes into the room with his property, which he has taken under his own custody, and afterwards leaves the room unprotected, and without making any communication to the innkeeper, which might have put him on his guard as to the protection of it. To hold in such a case that the defendant is liable, would be to make him liable not for his own negligence but for the negligence of his guest; for grosser negligence can hardly be stated; and it would be to enable the plaintiff to take advantage of his own negligence, which has been the sole cause of the loss.

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DAMPIER J. Upon the facts of this case, and the law resulting from it, if it had been distinctly laid down to the jury, I should have no difficulty in saying that the verdict was right. Indeed the jury could not have arrived at a more proper conclusion. My only doubt has been whether, from the concise manner in which the learned Judge summed up, as it appears by the report, the law was so fully laid down as it might have been. It might have been more distinctly stated to the jury from *Caly's* case, that the innkeeper was not discharged by the offer of a room, for lodging the guest, with a key to it, unless the guest assented to the offer, and was content to take the custody of his own goods, and discharge the innkeeper. But as I think that if the law had been more distinctly stated, the jury ought to have come to the same conclusion, it would be useless to send the case to another trial.

Rule discharged.

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The KING *against* The Inhabitants of
LAMBETH.

Saturday,
June 10th.

UPON appeal, the Sessions discharged an order of two justices for the removal of *Elizabeth Pinnegar* and her children from *St. Mary Lambeth, Surrey*, to *East Garston, Berks*, subject to the opinion of this Court, on the following case:

The pauper's husband was hired by one *Wroughton* at eight shillings per week, and two guineas for the harvest, to do any thing the gardener should set him about; and under this hiring he served four years in the parish of *Chadlesworth*, and slept upon the premises

A hiring at 8s. per week, and two guineas for the harvest, to do any thing the gardener should set him about, is not a yearly hiring.

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of *Wroughton*. The sessions were of opinion that the pauper thereby gained a settlement in *Chadlesworth*.

Lawes and *Barrow*, in support of the order of sessions, endeavoured to distinguish this case from *Rex v. Dodderhill* (a), in this particular, that here was an agreement for a gross sum to be paid for the harvest, and not merely, as in that case, for an increase of the weekly wages in the harvest month. And *for the harvest* imports for a consolidated period, at least as long as a month, for which period these wages are reserved, which is inconsistent with the notion of a weekly hiring; and therefore this case falls within the principle of *Rex v. Hampreston*. (b)

But per Lord ELLENBOROUGH C. J. It does not distinctly appear whether the two guineas were to be paid *de incremento*, or were to cover the whole harvest. All that appears is that the hiring being by the week, the parties contemplated that possibly it might last through the harvest.

Per Curiam,

Order of Sessions quashed.

Nolan was against the order of sessions.

(a) *Ante*, vol. iii. 243.

(b) 5 T. R. 205.

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The KING *against* BRADFORD.Saturday,
June 10th.

THE sessions upon appeal confirmed a rate made for the relief of the poor of the parish of *Saltwood* in *Kent*, by which *W. Bradford* was assessed as the occupier of the small canteen in *Hythe* Barracks upon the sum of 393*l.* 15*s.* subject to the opinion of this Court, upon a case stated, which in substance was this:

By indenture of the 21st of *September* 1813, between three of the commissioners for the affairs of barracks, of the one part, and *W. Bradford* of the other, the commissioners in consideration of the rents, covenants, &c. on the part of *Bradford* to be paid and performed, &c. demised to *Bradford*, and *Bradford* did thereby take of them the building or apartments called the small canteen in *Hythe* barracks in the county of *Kent*, to hold the said canteen as such for one year only, commencing from the 30th of *September* 1813, provided the said barracks should be so long held by government and used as a barrack, and to pay for the same, the rent or sum of 15*l.* for the said canteen, buildings, and appurtenances thereunto belonging, and also the further sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions, liquors, and other articles usually sold by sutlers, making together the sum of 525*l.*, to be paid clear of all deductions by four equal payments, or a proportional part of the said rent and sum of money for so much of the year as the said barrack and canteen should be continued as such (in case the said barrack and canteen should not be so continued until the end of the term) to be calculated up to the

A canteen in barracks demised to *B.* by the barrack-board for a year, at a rent of 15*l.* for the canteen and buildings, and also the farther sum of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c. usually sold by sutlers, with power of distress for the aggregate sum, was held to be one entire rent for the canteen; and therefore *B.* was held rateable to the relief of the poor as occupier of the canteen, in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.*

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day of such continuance, and the sum for rent and the sum due for such privilege as aforesaid to be added together and to be recoverable in one sum, as rent, by distress or otherwise. And *Bradford* covenanted to observe the orders of the commissioners for the regulation of the barracks and canteen, &c., and that he would not allow any beer or liquors, &c. to be carried out of the canteen except to commissioned officers. And in case he should quit or be removed from the canteen before the expiration of the year, the commissioners might calculate the proportion of rent, and also of the sum payable for the privilege of using the canteen as such due up to the day of such quitting or removal, or any preceding day, and add the same together, and might thereupon immediately distrain for the whole of such sum as rent, and proceed in like manner for such sum, and for the procuring thereof, by sale of the goods so distrained or otherwise, as if the same had been reserved and payable on such day, although it might be in the middle of a quarter, and might also nevertheless enforce the payment of the remainder of the rent, and the sum of money payable for the privilege of using the canteen as such for the said year, from *Bradford* under the indenture, and under the penalty therein contained; and no trade or occupation other than that of a sutler and canteen keeper should be exercised in the canteen; for the performance of all which covenants, &c. *Bradford* bound himself and heirs, &c. in a penalty. Under this indenture *Bradford* entered into possession of the canteen, and carried on the trade of a sutler there, at the time of making the rate, and was licensed by the justices of the peace, and by the officers of the excise,

to

to retail ale, &c. and spirituous liquors, in the canteen, in the same manner, and under the same regulations as other publicans. The annual value of the premises without the privilege of selling provisions and liquors is 11*l.* 5*s.* and with it is 39*3*/₄ 15*s.* Personal chattels and the profits of trade are not rated in the parish. The question was whether the rate ought to be on the larger or the lesser of these two sums; if upon the larger the rate to stand, if upon the lesser the rate to be amended accordingly.

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Taddy and *Berens*, in support of the rate, argued that the whole sum reserved by this indenture was substantially a rent, and that the reserving it *divisim* in several parts, as if the one were unconnected with the other, was only a colour to avoid this assessment. But the Court will look to the substance of every deed and not to the wording only, and if it appear in this case that the Defendant is a beneficial occupier to the extent to which he is assessed, will confirm the rate. Now the taking of this canteen is like the taking of any other public house, or tavern, the rateable value of which is to be estimated by reference to its locality, its good will, and the licence which belongs to it; that is, by combining all the things which tend to give it one entire value, and not by separating the mere value of the house or building from the rest. And upon this principle it was determined that the profits of a weighing (*a*) or a carding (*b*) machine, might be taken into the account in rating the value of the building. If it should be objected that the defendant's occupation was

(*a*) *Rex v. St. Nicholas, Gloucester, Cald.* 262.

(*b*) *Rex v. Hogg, Cald.* 266. 1 *T. R.* 721.

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for the exercise of a public duty, and therefore he is not rateable; it may be answered that if he also derive any individual benefit from it he is rateable. Thus the gunner at *Seaford* (a) the comptroller of *Chelsea* College (b), the ranger of a royal park (c), and the commanding officer at *Portsmouth* barracks (d), were held rateable. Nor can it be fairly said, what the deed seeks to have said, that this privilege of using it as a canteen, &c. is but a personal privilege, and therefore not rateable in a place where matters of personalty are not rated. For 1st, it is a privilege of using it as a canteen and selling liquors therein, and by the deed the defendant covenants that he will not allow any liquors, &c. to be carried out of the canteen, except to commissioned officers; so that the privilege is strictly local, being confined to the canteen. Next, it is plain that without a licence from the justices, the privilege could not have been exercised at all; but the justices in granting their licence, license the house as well as the person, and would not do well to grant a licence, if they disapproved of either. The form of the licence itself imports locality, it is "to *A. B.* at the sign of — or at the canteen, &c.;" and the stat. 16 G.2. c.8. s.10. prohibits the granting of licences to any person except *such as keep taverns, or ale houses*; and by stat. 26 G.2. c.31. s.3. no licence shall intitle any person to keep an ale house *in any other place than that* in which it was first kept by virtue of such licence, and such licence with regard *to all other places* shall be void. Where-

(a) *Rex v. Hardis*, 3 T. R. 497.

(b) *Eyre v. Smallpace*, 2 Burr. 1059.

(c) *Lord Bute v. Grindall*, 1 T. R. 338. 2 H. Bl. 265.

(d) *Rex v. Terrott*, 3 East, 506.

fore

fore the defendant in this case is rateable in the larger sum, as for the value of this canteen, with the privilege annexed to it, of which he is the beneficial occupier; in like manner as the lessee of an ancient mill, at which all the inhabitants, &c. ought to grind, would be rateable for the value of the mill with the suit annexed.

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Bolland and *Boteler*, contra, principally relied on the distinction between things real, which are fixed, and cannot be moved from their place, and things personal, which are moveable, and attend the person wherever he goes. And they said that the privilege granted to the defendant by this indenture was of the latter sort; and so this case differs from the cases of the carding and weighing machines, which were each of them more or less considered as affixed to, and constituting a part of the freehold.

LORD ELLENBOROUGH C. J. I cannot look at the reservation in this indenture in any other point of view than as a mode which the parties have chosen of dividing the rent. For it is in substance but one entire rent payable for the occupation of a real tenement, and for the enjoyment of the advantages belonging to it. From its vicinity to the barracks, it of course would attract to it almost all the custom of that neighbourhood, and this is the incident to the property which renders it valuable. If this could be separated from the value of the tenement, and the rent distributed accordingly, we should henceforth never see a demise of any public house in which this form of distribution would not be observed; the lessor would let the tenement at the bare rent which it was worth, and the

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privilege of carrying on the trade at a separate and independent rent. And this would be a receipt for reducing the annual value of the tenement to a mere shadow. But we must judge of things as they really are, and not as they may appear to be; and therefore we are to consider here whether this be not substantially one entire rent in respect of one entire subject, though artificially divided into several payments. Now it does appear to me that this is as much a profit appurtenant to the tenement arising from its local situation, as was the profit of the weighing or carding machine, to the tenements there rated. And it has not been improperly likened to the case of a soke mill, which is let at a higher rent, because it has a right to the sole multure of all the corn and grain in the neighbourhood. Can it be doubted that this would form a part of the rateable value of the mill itself? Therefore I cannot consider this reservation *distributive*, where it is in truth in respect of one entire taking of an entire thing with the benefits incident to it. It seems to me that this defendant is rateable, not only in respect of the 15*l.* reserved nominally as the rent, but also in respect of the farther sum of 510*l.*

LE BLANC J. As I understand it, the rate is imposed upon the defendant as occupier of this canteen, for which he is rated as upon an estimate that its annual value amounts to 393*l.* 15*s.* The case states that the commissioners of the barrack board demised to him this canteen, at a rent of 15*l.* for the canteen, and also the farther sum of 510*l.* for the privilege of using it as a canteen, and selling in it provisions and liquors and other articles usually sold by sutlers. And the question

question for our opinion is whether he ought to be rated in respect of 11*l.* 5*s.* the reduced proportion of the sum of 15*l.* or in respect of 393*l.* 15*s.* the same reduced proportion of the aggregate sum of 525*l.* which is compounded of the two sums of 15*l.* and 510*l.* reserved by the lease. Now in this case I cannot but consider, notwithstanding the division of the rent into two parcels, that this canteen stands precisely on the same footing as a public house; that is, it acquires a value from its situation and from its being fitted up in a manner calculated to answer the purpose of a public house. It is quite immaterial whether the rent which is paid for it is divided into separate parts, so much for the house, and so much for the privilege that it enjoys, if it be a rent for one entire canteen. And the party is not rated in respect of the profits of his trade but only of the rent which he pays; and this, at the reduced ratio according to which the other property in the parish is rated.

DAMPIER J. Although the rent is divided in one part of the lease, I find in another part that the whole is carefully included under the power of distress.

Per Curiam,

Rate confirmed.

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Saturday,
June 10th.The KING *against* The Guardians of the Poor
of ST. NICHOLAS, ROCHESTER.Mandamus
does not lie to
restore the clerk
and treasurer of
the guardians
of the poor of
St. Nicholas,
Rochester.

UPON a rule nisi obtained in the last term to restore one *Pratt* to the office of clerk and treasurer of the guardians of the poor of *Saint Nicholas*, the case, as stated on the affidavit of *Pratt*, was this :

By stat. 49 G. 3. c. 40. (local and personal) for the better assessing and collecting the poor and other rates in the parish of *Saint Nicholas, Rochester*, the churchwardens and overseers of the parish with thirteen persons are appointed guardians, out of which six are to go out of office every *Easter*, and others are to be chosen in their place, and in the place of such as should die or remove out of the parish. In this body are vested the rights and powers of churchwardens and overseers with power to seven of them or more to nominate a treasurer and clerk to the said guardians, such treasurer and clerk to be resident in and rated to the poor of the parish. And the guardians are to take security for the faithful performance of his office, and to allow him such salary as the seven or more should think fit. The guardians are to make rates, to be received by the collector, and paid over to the treasurer or such person as they should appoint, and the treasurer is to pay such sums as he shall receive to such persons and in such manner as the guardians shall direct. And the guardians are to be sued in the name of their treasurer. Immediately after the passing of this act in 1809, *Pratt* was appointed clerk, and, in 1810, treasurer,

without limitation as to the duration of either office, and he continued to act as such until *March* 1815, when, in consequence of some disagreement between him and the guardians, it was resolved by the guardians that the offices of treasurer and clerk were incompatible in the same person, and another person was appointed treasurer, and it was also resolved that it was proper to desist for the present from the appointment of any farther officers, and notice was given to *Pratt*, signed by eight guardians, to render his account, and pay over the balance to the new treasurer, and deliver up all his books, &c. to the guardians.

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against
The Guardians
of
ST. NICHOLAS,
ROCHESTER.

And now the question was, if this were an office for which a mandamus lies.

Marryat and *Holroyd*, who shewed cause, contended that it was not; for the body which nominates to it is not a corporate body, but is merely added to, and is as fluctuating as the parish officers themselves. And what more is their clerk than a vestry clerk, for whom a mandamus lies not (a); or their treasurer than a common banker, out of whose hands the funds may be withdrawn ad libitum? He has no freehold, neither is entitled to any fees, but only to an allowance at the option of the guardians, which may be either a penny or a pound. And if a mandamus lies for this office, by the same rule it would lie for the toll-keeper of every turnpike gate appointed by the trustees.

Moore contra, argued that a mandamus lies in this case; for the statute denominates this person an officer,

(a) *Rex v. Churchwardens of Croydon*, 5 T. R. 713.

and

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and the thing an office, and it is required of him to give security, and his appointment is without limitation as to time, so that he is not removeable *quamdiu se bene gesserit*; in the same manner as if a corporation are to choose a town clerk generally, it shall be for his life. (a)

But *per Curiam*. (b) If this were a corporate office, and the appointment were general, it would be different; but this person is only a servant to a fugitive body. And the Court will look to the nature of the appointment, which in this case it would be inconvenient to consider as a permanent one, for his sureties may die, and he may be in tottering circumstances.

Rule discharged,

(a) *Dighton's case*, 1 Vent. 82.

(b) Lord *Ellenborough* C. J. left the Court during the argument.

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The KING *against* The JUSTICES of the West
Riding of York. Saturday,
June 10th.

AN order of removal from a township in the *West Riding* to the parish of *Saint Luke* in *Middlesex*, was dated on the 3d of *January* and executed on the 12th, and the *Epiphany* sessions for the *West Riding* were holden on the 18th. The parish of *Saint Luke* did not appeal to those sessions, but offered to appeal at the *Easter* sessions in *April*, when the justices refused to receive the appeal.

A rule nisi was obtained for a mandamus to the justices to receive the appeal, on the ground that the order was executed too near the time of the *Epiphany* sessions to make it practicable to appeal to them, considering the distance of the parish of *Saint Luke* from the place where those sessions were holden.

E. Alderson, who shewed cause, contended that there was time for the parish to have entered and respited their appeal at the *Epiphany* sessions, which was all that could be required of them, and he cited *Rex v. Justices of Herefordshire*. (a) But granting that they were not bound so to do, yet they ought to have come prepared at the next sessions not only to enter, but to try the appeal, and ought to have given notice to that effect to the respondents, whereas they gave no notice, and were not in a condition to be heard, but only to enter and respite their appeal at the *Easter* sessions.

Where an order of removal from a township in *Yorkshire* to a parish in *Middlesex* was executed on the 12th of *January*, and the *Yorkshire Epiphany* sessions were holden on the 18th, and the parish did not appeal until the *Easter* sessions, when the justices refused to receive the appeal, this Court would not grant a mandamus to the justices to receive the appeal, it appearing that the appellants were not ready to enter and try their appeal at the *Easter* sessions, but only to enter and respite.

(a) 3 T. R. 504.

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The KING
against
The Justices of
the W. R. of
YORK.

Gurney contrà, said, that the ground on which the justices refused to receive the appeal, was that it was out of time, and not on account of the objection last stated; and he farther insisted that the appellants were entitled to ask to enter and respite their appeal, for if an appeal to the next practicable sessions is an appeal to the next sessions, it is so with all its consequences, one of which is that the appellant has a right to have it adjourned to the following sessions, if it appear that notice has not been given.

LE BLANC J. (a) We do not think that the parish were entitled strictly to pass over the first sessions; but if they had done at the second as much as they ought to have done, the Court would have relieved them. The parish might possibly have gone in the first instance to the *Epiphany* sessions, but they have not done this, and have also not placed themselves in a situation to be heard at the second sessions; the Court therefore do not see a sufficient ground for granting the mandamus.

Per Curiam,

Rule discharged.

(a) Lord *Ellenborough* C. J. had left the court.

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HUNT *against* PASMAN.Wednesday,
June 14th.

JUDGMENT against the defendant and two others upon a joint warrant of attorney, by the three; and *fi. fa.* against the defendant only, reciting a judgment against him alone; under which his goods were taken and sold, but before the sale, he became bankrupt.

The Court refused to allow plaintiff to amend a *fi. fa.* where the defendant had become bankrupt before sale of the goods taken under it.

Curwood now moved to amend the *fi. fa.*, by making it conformable to the judgment.

Lawes opposed the rule, in the first instance, and said at the same time, that he was instructed to move to set the writ aside for irregularity. He said that as a bankruptcy had intervened, the Court would not now permit the amendment, and that by setting aside the writ, the property would vest where it ought, in the assignees; and he cited *Paris v. Wilkinson*. (a)

Curwood answered, that in the case cited, the Court were inclined to allow the amendment, but that it would not answer the plaintiff's purpose.

LORD ELLENBOROUGH C. J. The Court would not give the plaintiff leave in that case to amend to the prejudice of the rights of third persons; and I am not aware of any case in which they have so done. We are very unwilling at all times to interfere with the rights of parties which have accrued by bankruptcy. In this case not only the recital but the mandatory part

(a) 8 T. R. 153.

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HUNT
against
PASMAN.

of the writ must be amended. Had the application been made earlier we might have been inclined to listen to it, but without some authority to warrant it, I think it would be going too far in this stage of the case, to allow the amendment.

DAMPIER J. The plaintiff's own mistake makes it necessary for him to come to the favor of the Court, which might have been extended to him, if the rights of third persons had not intervened.

Per Curiam,

Rule refused.

Wednesday,
June 14th.

BOSANQUET and Others, surviving Partners, &c.
against FILLIS.

Affidavit of debt, "that defendant is indebted to plaintiff in 6000*l.* upon a bond, bearing date, &c. and made and entered into by defendant to plaintiff in the penal sum of 25,000*l.*" without shewing the condition of the bond, is insufficient; and the Court discharged defendant on common bail.

THE defendant was held to bail upon an affidavit of debt, which stated "that the defendant is indebted to the plaintiffs in the sum of 6000*l.* upon or by virtue of a certain bond or writing obligatory, bearing date on or about the 19th of *June* 1812, and made and entered into by the defendant and his then partners, *W. C.* and *M. T.* jointly and severally to the plaintiffs and their late partner, in the penal sum of 25,000*l.*" And upon a rule nisi for discharging the defendant on common bail,

Puller and *Bolland* shewed cause and admitted, according to *Hatfield v. Linguard* (a), that a party cannot be held to bail for a penalty; but here they said the defendant is not held to bail for the penalty, but for a

(a) 6 *T. R.* 217.

much

much less sum, which may well be taken to be the sum secured, or at all events it is distinct from the penalty.

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BOSANQUET
against
FILLIS.

LORD ELLENBOROUGH C. J. referred to *Willey v. Thornton (a)*, and said, that here it did not appear what was the condition of the bond, though the affidavit by using the term penal sum, imported that it was upon a condition of some sort: non constat, it may not be conditioned for the performance of covenants, and the Court are not to draw any conclusion, but the plaintiffs ought at their peril to shew it.

LE BLANC J. Consistently with this affidavit, it may be a bond for securing the performance of covenants and agreements, upon which the plaintiffs cannot hold the defendant to bail without stating breaches, and how much they are damnified.

Per Curiam,

Rule absolute.

Gifford was in support of the rule.

(a) 2 East, 409.

BASKETT *against* BARNARD and Another.

Wednesday,
June 14th.

UPON a rule nisi for leave to take out execution notwithstanding the allowance of a writ of error, upon the ground that the writ of error was for delay, one affidavit in support of the rule stated that *Jones*

Leave refused to take out execution notwithstanding a writ of error, where it did not appear but that the declaration of the defendant

that he would sue out a writ of error and delay plaintiff, was made before any action pending. An affidavit to ground a rule for leave to take out execution notwithstanding a writ of error may be sworn before judgment signed.

(one

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 BASKETT
 against
 BARNARD.

(one of the defendants) conversed with the deponent on the subject of the plaintiff's demand, and admitted it to be a just and true debt, and desired him to get it compromised, and declared that if the plaintiff did not consent to get it compromised, he would sue out a writ of error and delay him for 12 months, or put him to as much expence as possible; but the affidavit did not give any date to this conversation. Another affidavit stated several conversations before and after interlocutory judgment, and that *Jones* offered a cognovit for the debt payable by instalments, and said that if the cognovit was not accepted he would bring a writ of error; but this part of the affidavit as to the offer of the cognovit, and the saying he would bring a writ of error, was denied by the affidavit *contra*, though it was admitted by it that there had been several interviews in which *Jones* had endeavoured to compromise. But no answer was given to the first affidavit.

Marryat who shewed cause opposed the reading of the first affidavit because it was made too soon, being sworn before judgment signed.

But *per Curiam*, the party may be indicted for perjury upon it: and per *Bayley J.* an affidavit to support a plea in abatement may be made before declaration. (a)

Marryat, then objected that this affidavit gave no time to the conversation, which was material.

Casberd contra, answered that it was enough that the affidavit shewed the conversation to relate to the

(a) *Lang v. Comber*, 4 East, 348.

demand;

demand; and he referred to the rule laid down in *Hawkins v. Smuggs* (a); and relied also upon the admission on the other side that the defendant had endeavoured to compromise.

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LORD ELLENBOROUGH C. J. The first affidavit it is true alludes to the plaintiff's demand, and states how the defendant declared that he would elude it, but for any thing we know the record might not at that time have any existence. The rule in *Hawkins v. Smuggs* must be understood with reference to where there is an existing record, but not to every declaration of the party where no action is pending. In this case then we are desired to go one step farther than in *Hawkins v. Smuggs*, which went one step farther than the former cases. But how are we to say that this declaration was not made respecting a record at that time *in nubibus*?

Per Curiam,

Rule discharged.

(a) *Ante*, vol. ii. 479.WELSH *against* WELSH and Another.

Wednesday,
June 14th.

THE plaintiff became surety for the defendants in an annuity deed, and afterwards the defendants became bankrupt and obtained their certificate, and the plaintiff after the allowance of the certificate was called upon, and compelled by the annuity creditor to pay

A surety in an annuity deed who is compelled by the annuity creditor after the bankruptcy and allowance of the certificate of the principal to pay several

sums for arrears due after the issuing of the commission, is not within stat. 49 G. 3. c. 121. s. 8. and therefore may have an action against the principal for such sums and hold him to bail.

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 WELSH
 against
 WELSH.

several sums for arrears of the annuity due after issuing the commission: to recover which, he brought this action, and held the defendants to bail.

And upon a rule nisi for discharging the defendants on common bail, upon the ground of their bankruptcy and certificate, *Abbott* shewed cause, and contended that this was not a case in which the plaintiff could by stat. 49. G. 3. c. 121. s. 8. have come in and proved under the commission, for this was not a debt at the time of issuing the commission, nor was he called on to pay it until after the certificate. And s. 17. only applies to the annuity creditor but not to enable the surety to come in and prove.

Peake contra, contended that the act meant to place the surety in the condition of being able to come in under the commission, and have the value of the annuity ascertained by the commissioners, and he cited *Stedman v. Martinnant*. (a)

LORD ELLENBOROUGH C. J. The surety cannot compel the annuity creditor to come in and prove, and it is not a debt quoad the surety, until he is in a condition to be damnified by it. If the legislature intended such a case as this, they have not so said, nor have they used language sufficiently clear to enable us so to say.

LE BLANC J. By s. 17. the annuity creditor, whether there shall or shall not be arrears due, may prove for the value of the annuity.

Rule discharged. (b)

(a) 13 *East*, 427. (b) See per *Bayley J. Page v. Bussel*, ante, vol. ii. 553.

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BUTLER *against* COHEN.Wednesday,
June 14th.

UPON a rule nisi obtained in last *Hilary* term for setting aside the service of process as irregular, because the year in the *English* notice was in figures and not in words at length, the case was spoken to on the last day of that term by *Tindal* against the rule, and *Gifford* in support of it, when the Court adjourned the case, saying that it would be expedient to confer with the Judges of the Common Pleas in order to adopt a rule for the future.

The year being in figures in the *English* notice does not make the service of the process irregular.

And now upon *Tindal's* suggesting that the case stood for judgment, *Le Blanc* J. (a) said, that the Court had mentioned it to the other Judges, and that they all agreed that this was not a valid objection to the notice; the consequence of which was that the rule must be discharged. He added that in this case nothing was in figures but the year.

Rule discharged. (b)

(a) Lord *Ellenborough* C. J. had left the Court.

(b) S. P. determined in *Baylis v. Hall*, by *Bayley* J. (the only Judge in court) on a former day in this term. See *Pinero v. Hudson*, ante, vol. i. 119. *Grojan v. Lee*, 5 *Taunt.* 651. *Williams v. Jay*, *ibid.* 652. *Eyre v. Walsb*, 6 *Taunt.* 333.

END OF TRINITY TERM.

C A S E S

ARGUED AND DETERMINED

1815.

IN THE

Court of KING's BENCH,

IN

Michaelmas Term,

In the Fifty-sixth Year of the Reign of GEORGE III.

The KING, on the Prosecution of N. P. WYNDHAM, *Tuesday,*
against MANN. *Nov. 7.*

THE defendant was acquitted at the last *Suffolk*
assizes upon not guilty to an indictment for a nui-
sance in continuing a hut erected upon the highway.

New trial re-
fused after ver-
dict for defend-
ant, upon not
guilty to an
indictment for
a nuisance to a
highway.

And now *Blosset* Serjt. moved on behalf of the crown
for a new trial, on the ground that the verdict was
against evidence.

But per Lord ELLENBOROUGH C. J. Unless you can
point out some distinction between the case of a nui-
sance, and other criminal cases, the general rule is that
we do not grant a new trial upon an indictment for a

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The KING
against
MANN.

misdemeanour, where a verdict has passed for the defendant upon the merits. This is, to be sure, in the nature of a remedy for a civil right; yet it is in form a criminal proceeding, and may subject the defendant to be punished criminally. And his Lordship referred to *Rex v. Reynell. (a)*

DAMPIER J. In penal actions, where the verdict is for the defendant, the Court I believe do not grant a new trial, except for a misdirection of the Judge. It was formerly doubted in quo warranto informations, but this has since been considered as an excepted case. (b)

Per Curiam,

Rule refused.

(a) 6 East, 315.

(b) See 2 T. R. 484. *Rex v. Francis.*

Tuesday,
Nov. 7.

THOMPSON against ROCK.

If a bail-bond be dated and made after the return of the writ, the defendant may avoid it on *non est factum*.

DEBT by the plaintiff as assignee of a bail-bond. Plea, *non est factum*. At the trial before *Heath J.* at the last *Warwickshire* assizes, the subscribing witness to the bond proved, upon cross-examination, that it was dated and executed on a day subsequent to the return of the writ; whereupon the learned Judge directed a nonsuit.

And it was moved by *Clarke* for the plaintiff, that a verdict might be entered for him; for granting that the sheriff could not take this bond, yet the defendant cannot avoid it by pleading *non est factum*, and giving this in evidence, but he ought to have pleaded the special matter.

matter. And he cited *Whelpdale's* case (a); "As if a bond be made to a sheriff against the stat. 23 *H. 6. c. 10.*, or against the stat. 13 *Eliz. c. 8.* of usury, in these and other like cases the obligor ought to plead the special matter, with conclusion of judgment, if action; and not to plead *non est factum*."

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 THOMPSON
 against
 ROCK.

LORD ELLENBOROUGH C. J. If the defendant might have pleaded a special *non est factum*, he may according to the modern practice plead it generally. And certainly the sheriff had no authority to take a bond for appearance after the return-day was past, and the assignee of the sheriff can be in no better condition than the sheriff, but must take the assignment with all its consequences. If the sheriff has assigned an invalid security, the plaintiff may resort to him upon his responsibility. Here the matter would have been good upon a special *non est factum*, and that being no longer necessary, the defendant may prove it upon *non est factum* generally.

BAYLEY J. If it had been pleaded to this bond *quod primo deliberatum est* on a day after the return of the writ, the proper conclusion would have been, *et sic non est factum*.

DAMPIER J. A special *non est factum* is now never pleaded, but if the bond when it was executed was void *ab initio*, the defendant may say *non est factum* generally.

Per Curiam,

Rule refused.

(a) 5 *Rep.* 119. 3d *Resolution*.

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Wednesday,
Nov. 8.

WHITECHURCH *against* HOLWORTHY.

The lord of a manor has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there be no custom in the manor.

THE following case was sent from Chancery for the opinion of this Court.

The defendant is lord of the manor of *Elsworth* in *Cambridgeshire*, and is seised thereof in fee, the fines of which manor are arbitrary. The plaintiff in 1803 was admitted tenant of three undivided fourth parts of certain closes in *Elsworth*, holden of the manor, to him and his heirs by copy of court roll at the will of the lord according to the custom of the manor, and he has since continued in the occupation thereof. The defendant claims to be entitled by law, independently of any custom, as lord of the manor, to enter without the consent of the plaintiff or his heirs upon the said closes, and cut down, for his own use and benefit, the timber growing thereon, leaving a sufficiency for reasonable botes and estovers. There is no custom within the manor which gives the timber either to the lord or to the tenant, or which in any manner respects the property or interest in the timber, or the right of entry to cut it down.

The question was, whether the defendant has by law, independently of any custom, any such property or interest in the timber growing upon the closes, to which the plaintiff has been so admitted to him and his heirs, as entitles him, as lord of the manor of *Elsworth*, without the consent of the plaintiff or his heirs, to enter upon the closes and cut down, for his own use and benefit, the timber growing thereon, leaving a sufficient quantity of the same for reasonable botes and estovers.

Robinson

Robinson for the plaintiff argued in the last term against the lord's right both upon principle and from authorities. On principle, because a copyholder is at least a tenant at will, and if the lord could enter and cut down trees, it would be a determination of the will. For "there is," says Lord *Coke*, "an express ouster and an implied ouster; implied, as if the lessor without the consent of the lessee enter into the land and cut down a tree, this is a determination of the will, for that it should be otherwise a wrong in him, unless the trees were excepted, and then it is no determination of the will; for then the act is lawful although the will doth continue (a)." Therefore wherever the lord is not at liberty to determine the will, or the trees are not reserved to him, he cannot enter upon his copyholder, to cut them down. Next, as to the authorities, *Bourne v. Taylor* (b), which is the latest, decides that the lord cannot without a custom enter upon the copyhold to dig for mines; and upon reason equally good, he cannot enter to cut down trees; for both these are alike acts of ownership inconsistent with the continuance of the estate at will. And so it appears they have been judicially considered; for, says Lord *Eldon*, "I have looked into *Bourne v. Taylor*, from which I collect that the lord of a manor may be in the same situation with respect to mines, as with respect to trees; that is, the property may be in him; but it does not follow that he can enter and take it without consent (c)." It may be said, indeed, that in *Heydon v. Smith* (d) Lord *Coke* held, "that without custom the lord may take the trees, if he leave sufficient

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(a) *Co. Lit.* 55. b.(b) 10 *East*, 189.(c) 17 *Ves.* 282.(d) *Godb.* 174.

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to the copyholder for estovers;" but, beside that this was extrajudicial, the contrary was holden by *Foster J.*, for he said "that without a custom the lord cannot fell the trees growing upon the copyhold, no more than upon a lease for years." And the copyholder in that case ultimately had judgment; and it appears by another report of the same case (*a*), that it was resolved "that the copyholder shall have a general action of trespass against the lord *quare claus. freg. et arborem suam succidit*; for the custom hath fixed it to his estate against the lord." And the case at bar differs from *Ashmead v. Ranger* (*b*), which was determined in *Dom. Proc.* against the opinion of all the Judges in favour of the lord's right; for there the copyholder was only for life; which distinction between a mere copyholder for life, and where he hath the inheritance, or may nominate his successor, has been recognized in other cases (*c*). And as to *Northey's* argument in *Ashmead v. Ranger*, that the tenant could not cut the trees, and if the lord could not, they must rot on the land, for then nobody could; take it the other way that the lord cannot cut, and the argument will serve equally well for the tenant's right to cut; and it is not unworthy of remark that this argument was at first used for the tenant, as appears by the *Seigneur de Rutland's* case (*d*); for there the Court argued, that "if the parson might not dig for and open mines in his glebe, not any of all the mines in the whole glebe of *England* could ever be opened;" and they added, "*Et*

(*a*) 13 Rep. 67., 5th Resolution.

(*b*) 11 Mod 18. 12 Mod. 378. 2 Salk. 638.

(*c*) *Powel v. Peacock*, Cro. J. 29. *Rockey v. Huggins*, Cro. Car. 220. *Rowles v. Mason*, Brownl. 132. *Gilb. Ten.* 237. 2 T. R. 748. per Lord Kenyon.

(*d*) 1 Sid. 152.

mesme

mesme ley semble del copyholder de inheritance." And it appears that *Northey's* argument in *Ashmead v. Ranger* had been used by him before, and answered by *Holt* C.J., who denied the lord's right, saying "that the copyholder has the same interest in the trees that he has in the land, and that he had always taken it so (a)." So *Vin. Abr. (b)*, "In case of copyholders of inheritance it was lately adjudged in *Dom. Proc.* that neither the copyholder without the lord, nor the lord without the copyholder, without a custom, could cut down trees on the copyhold. And so reversed a judgment *B. R.*" It seems also by stat. 9 G. 1. c. 29. that the legislature considered the timber as part of the issues and profits of the copyholders' estates; for by s. 2. they except out of *the rents, issues, and profits thereof*, which the lord in certain cases is empowered to enter and receive till he is satisfied his fine, *the liberty to sell any timber thereon.*

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Holroyd, contra, admitted that without a custom the lord may not enter to dig for mines; but as to trees he said it was otherwise, for here the law adopting the argument *ab inconvenienti* gives them to the lord. For trees are in their nature not like mines, because they are perishable, and become of no value if suffered to stand beyond a certain time; but mines do not decay, nor are they deteriorated, by remaining unopened. There is no certain time when it can be said of them that if they are not worked they will rot; but timber will be gone for ever, and lost to the community, if it be not cut down within a time certain. Also the lord

(a) *Earl of Kent v. Walters*, 12 Mod. 317.(b) *Copyhold*, R. c. 2. s. 18.

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may not dig for mines, because of the great detriment to the copyholder's estate, but the cutting a tree is not a continuing injury. From all which considerations it is consonant both with reason and convenience that the law should make a difference between mines and trees; and the true distinction seems to be, that without a custom, the lord may not dig for mines upon the copyhold lands (*a*), but he may cut down timber trees growing upon the lands, provided he leave sufficient for house-bote, &c. (*b*), for otherwise the timber might stand and rot, and nobody be the better for it; but by custom he may be restrained from cutting down the trees, as if the copyholder be entitled by custom to cut them down. And it appears by *Heydon v. Smith* (*c*), that *Foster J.* did not materially differ from Lord *Coke* in his opinion that by general custom of copyhold, or as Lord *Coke* puts it, without any custom, the lord may take the trees, if he leave sufficient, &c.; for *Foster* agreed that in that case, by implication of custom, the lord might take them; and yet there was no custom in that case but that the copyholder should have sufficient for reparations, which every copyholder has *de communi jure*, so that the laying the custom was only by way of caution; and the reason why the case was adjudged for the tenant was because the lord did not leave sufficient. *Northey's* argument, in *Earl of Kent v. Walters*, was also upon the general custom; and so was the decision in *Ashmead v. Ranger*; and though Lord *Holt* expressed his opinion that "a copyholder holds the trees by copy as well as the land, and therefore the

(*a*) *Bourne v. Taylor*, 10 *East*, 189.

(*b*) 13 *Rep.* 67. 1 *Leon.* 272. *pl.* 365. *Gilb. Ten.* 239. 327.

(*c*) *Godb.* 174.

lord .

lord could not cut the trees growing upon the copyhold (a),” yet he said he would not give an absolute opinion as to that point; and the case was finally determined with the lord because of the inconvenience that would ensue if the lord might not cut the trees (b). Nor was this a new principle at that time, for the same was held in *Ayrey v. Bellingham* (c), and was recognized by the Court in *Stebbing v. Gosnal* (d), and is also proved by the exceptions which by special custom have been allowed against the lord’s right, as in *Swaine v. Becket* (e), *Crogate v. Morris* (f), *Rowles v. Mason* (g). And as to the argument drawn from general principle against the lord’s right, because the cutting down trees is a determination of the will, which it is not at the option of the lord to determine, it is to be recollected that copyhold in its original was nothing better than a mere estate at will, which the lord might determine at any time; and though that will is now qualified and restrained by custom, yet where custom is not against it, and where convenience requires that the lord should still have this right, there is no incongruity in its remaining in the lord as he originally had it, with this difference that the exercise of it shall no longer amount to a determination of the will.

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Cur. adv. vult.

The following certificate was sent.

We have heard this case argued by counsel, and have considered it, and we are of opinion that the defendant has not by law, and independently of any

(a) 1 *Ld. Ray.* 552.(b) *Salk.* 638.(c) *Finch. R.* 199.(d) *Cro. El.* 629.(e) *Brown.* 231.(f) *Ibid.* 197.(g) 2 *Brownl.* 200.

custom,

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custom, any such property or interest in the timber growing upon the closes mentioned in the case to which the plaintiff has been admitted to him and his heirs, as entitles him as lord of the manor of *Elsworth*, without the consent of the plaintiff, to enter upon the said closes, and cut down, to his own use and benefit, the timber growing thereon, leaving a sufficient quantity of the same for reasonable botes and estovers.

ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

H. DAMPIER.

Nov. 8th 1815.

Thursday,
Nov. 9th.

OLIVERSON *against* LOUGHMAN.

The statute
43 G. 3. c. 153.
s. 13. does not
authorize the
importation of
cotton wool into
Great Britain.

ASSUMPSIT on a policy of assurance on the ship *Huron* at and from *Pensacola* to *Liverpool*. Plea non assumpsit. At the trial before Lord *Ellenborough* C. J. at the last *London* sittings, the case was that the ship was a *Russian* ship, and was navigated as a *Russian*, but belonged to the assured, and was captured on her voyage from *Pensacola* to *Liverpool*, with a cargo of cotton wool on board, laden at *Pensacola*. And it was objected for the Defendant that this importation was against the stat. 12 *Car.* 2. c. 18. (navigation act), and was not made legal by stat. 43 G. 3. c. 153. s. 13. which empowers "any person to import into any port or place in *Great Britain* all sorts of wool, and to import into *Ireland* all sorts of barilla, &c. wool and cotton wool, from any country and in any ship navigated by foreign seamen." For if the statute had said *all*

sorts of wool only, this might have included cotton wool as well as other, by reason of the generality of the words; but when in the next sentence it expressly names *cotton wool*, as well as *all sorts of wool*, that is the same thing as if the statute had said that *all sorts of wool* does not mean *cotton wool*, for otherwise the statute would be tautologous. And upon this objection the plaintiff was nonsuited.

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Park moved for a new trial, contending for a more general construction of the words *all sorts of wool* than that given to them at the trial.

LORD ELLENBOROUGH C. J. I am very sorry for the result, because this appears to be a hard case; but we must abide by the language of the act of parliament, which has marked the distinction between the sorts of wool in general and cotton wool.

LE BLANC J. The act's making the distinction in the very same clause affords a strong argument.

Per Curiam,

Rule refused.

DOE, on the Demise of KNIGHT, *against* Lady SMYTHE. *Thursday,*
Nov. 9th.

AT the trial of this ejectment before *Heath J.* at the last *Warwickshire* assizes, the tenant in possession did not appear to defend, but the defendant appeared to defend as landlady. It was proved that the tenant

possession came in as tenant to lessor of plaintiff, and paid rent to him, under an agreement that has expired.

A third person cannot defend as landlord upon the trial of an ejectment, where it appears that the tenant in

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in possession came in under an agreement with the lessor of the plaintiff for a term of years, which was expired, and paid rent to him, and afterwards disclaimed. And the doubt was if the defendant, who had entered into the landlord's rule, could set up her title in defence to this ejectment. It was objected that inasmuch as the tenant could not dispute the title of his lessor, neither could any other in the character of his landlord be permitted to do it. And the learned Judge being of that opinion, directed a verdict for the plaintiff.

Vaughan Serjt. moved for a new trial upon this point, and he said that supposing the objection to be well founded, yet it came too late; for this should have been made as an objection to the defendant's entering into the landlord's rule, or upon an application to the Court to discharge that rule.

LORD ELLENBOROUGH C. J. Who shall be considered as landlord is a consequence to be deduced from the acts of the parties, and is not to be doled away at pleasure.

BAYLEY J. The tenant should have given up the possession to *Knight*, and then the defendant, if she has title, might have maintained her ejectment.

DAMPIER J. The tenant in possession paid rent to the lessor and then disclaimed. But he ought to give back the possession to the lessor, and after that the defendant may have her ejectment. It has been ruled often that neither the tenant, nor any one claiming by him,

him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord. This, I believe, has been the rule for the last 25 years, and I remember was so laid down by *Buller J.* upon the western circuit.

Per Curiam,

Rule refused.

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JONES against Sir W. CLAYTON.

Friday,
Nov. 10th.

CASE against the sheriff of *Oxfordshire* for a false return of nulla bona to a fi. fa. issued against the goods of *R. and J. Stone*. There were two counts in the declaration; one alleged that "although the said *R. and J. Stone* had goods and chattels within the bailiwick of the sheriff sufficient to satisfy the debt and damages, &c. yet the defendant, &c. did not pay the debt and damages aforesaid, but did falsely return that the said *R. and J. S.* had not, nor had either of them, any goods or chattels whereof he could levy the said debt and damages, or any part thereof." The other count made a similar allegation as to *R. Stone* only. At the trial before *Wood B.* at the last *Oxfordshire* assizes, there was a verdict for the plaintiff for 146*l.* 15*s.* but the plaintiff did not prove that *R. Stone* had any effects whatsoever.

If plaintiff declares against the sheriff for a false return of nulla bona to a fi. fa. against the goods of *R. and J. S.*, and alleges that "although *R. and J. S.* had goods, &c. within his bailiwick, &c. yet defendant," &c.; this allegation is sustained, though plaintiff do not prove that *R. S.* had any goods; for it is severable that both or either of them had goods, &c.

W. E. Taunton moved for a new trial, contending that for want of this proof neither of the above allegations was sustained by the evidence.

But *per Curiam*. The first allegation is severable and not an entire allegation, the legal effect of it being, that

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that *B.* and *J. Stone*, both or either of them, had goods, &c. The allegation in substance is, that there were goods on which the sheriff might have levied the debt and damages, and that he neglected to levy, &c.

Rule refused.

Saturday,
Nov. 11th.

The KING *against* The Inhabitants of HARRINGWORTH.

Where, upon appeal against an order of removal, the appellants, in order to shew a settlement in a third parish, called the pauper to prove that he was bound apprentice by indenture to *D.* and served in the third parish, and then produced the indenture, but failing to prove the death of the subscribing witness, so as to entitle them to prove his hand-writing, proposed to call the pauper to prove his own execution and that of the other parties to the indenture, which evidence the Sessions rejected: Held that the Sessions did well, for the rule which requires the subscribing witness to be produced, or his absence accounted for, applies as well to settlement cases as others.

THE Sessions for the county of *Northampton* confirmed an order of justices for the removal of *W. Parr*, his wife and child, from *Gretton* to *Harringworth*, subject to the opinion of this Court upon the following case:

The birth-settlement of *W. Parr* having been proved to be in *Harringworth, Harringworth*, for the purpose of shewing that he had gained a subsequent settlement in *Oakham* by apprenticeship, called *Parr*, who stated that in 1790 he was bound apprentice by indenture to one *Drake* of *Oakham*, and duly served his time there with *Drake*. They then produced an indenture purporting to be executed by *Parr*, by *Parr's* father and *Drake*, and to be attested by two witnesses, and called persons to prove the deaths of those witnesses, but failed in proving the death of one of them to the satisfaction of the Court, so as to entitle them to prove his hand-writing. Whereupon they tendered *Parr* as a witness to prove his own execution of the indenture, as well as that of his father,

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and his master. The Sessions were of opinion that this witness could not be received.

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G. Marriott and Adams, who were against the order of sessions, were called on by the Court, and argued for the admissibility of the witness, because, as they said, there is not the same reason for requiring the attesting witness to be called, in cases of this sort, that there is in other cases. For the reason for requiring the attesting witness is, that a party shall not be charged with any deed without having the benefit of all the knowledge of the subscribing witness relative to the transaction; and therefore before he is charged he ought to have an opportunity of cross-examining him (*a*). Also, where there is a subscribing witness, the parties thereby agree that the proof of their hand-writing shall be made through that medium (*b*); and this species of conventional evidence shall not be dispensed with by the acknowledgment of the party that it is his deed (*c*). And where the suit is between the parties to the deed, this is of itself a sufficient reason against calling either of them as a witness. But none of these reasons will be found to apply to the present case, because here the suit is not between the parties to the deed, but between third persons, who being strangers to any agreement between the parties touching the manner of proof, ought not to be bound by it. As if the parties to any deed should agree that one in particular of the subscribing witnesses only should be called to prove the deed, this might bind them,

(*a*) *Abbot v. Plumbe*, 1 Dougl. 216. *Call v. Dunning*, 4 East, 53.

(*b*) Per Grose J. *Barnes v. Trompowsky*, 7 T. R. 267.

(*c*) *Breton v. Cope*, Peake N. P. C. 30. *Manners v. Postan*, 4 Esp. N. P. C. 239.

but

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but how would it deprive a third person of the right to call any of the other subscribing witnesses? So here, if, but for the attesting witnesses, *Harringworth* might have called the pauper to prove the execution of the indenture, they shall do so now, because the attesting witnesses are only the chosen witnesses of the parties to the deed, and not of third parties. Now there is no reason against allowing a party to be a witness to prove the execution of his own deed, if he have no interest either way, and be not a party to the suit; and *cessante ratione cessat lex*. Wherefore, inasmuch as the pauper was wholly devoid of interest in this case, for a party's settlement gives him no interest, and inasmuch as this was a collateral issue, and not between the parties to the indenture, and which did not seek to charge either of them with it, this case may well admit of an exception to the general rule, which requires the subscribing witness to be produced. And the convenience of relaxing the rule in settlement cases, where the party has no interest whatever, is apparent from considering that he is full as likely as the subscribing witness, if not more likely, to know the whole transaction, and that the strict rule will oftentimes produce serious inconvenience in settlement cases.

Lord ELLENBOROUGH C. J. There hardly exists a general rule, out of which does not grow, or may be stated to grow, some possible inconvenience from a strict observance of it. Nevertheless, the convenience of having certain fixed rules, which is far above any other consideration, has induced courts of justice to adopt them, without canvassing every particular inconvenience which ingenuity may suggest as likely to be derived

derived from their application. The learned counsel who last sat down has talked of the serious inconvenience that will ensue in settlement law, if in a case like the present the party to the deed is not permitted to be called to prove it. I know of none that is a greater or more serious inconvenience than to depart from a clear established rule of law, that a party who would prove the execution of any instrument that is attested must lay the ground-work by calling the subscribing witness to prove it, if he can be produced, and is capable of being examined. His testimony indeed is not conclusive, for he may be of such a description as to be undeserving of credit, and then the party may go on to prove him such, and may call other witnesses to prove the execution. The cases have even gone the length of punishing the subscribing witness criminally. But here the only question is, whether the parties who seek to prove the execution of this indenture, must not make their way to what may be called secondary proof through the medium of those witnesses who are the plighted witnesses to the transaction, by first disposing of their testimony. If there ever was a case in which the rule might reasonably have been relaxed, it surely was the case of *Abbot v. Plumbe*, yet in that case the Court held the rule to be inexorable. The rule therefore is universal that you must first call the subscribing witness; and it is not to be varied in each particular case by trying whether in its application it may not be productive of some inconvenience, for then there would be no such thing as a general rule. A lawyer who is well stored with these rules would be no better than any other man that is without them, if by force of mere speculative reasoning it might be shewn that the application of such and such

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a rule would be productive of such and such an inconvenience, and therefore ought not to prevail. But if any general rule is to prevail, this is certainly one that is as fixed, formal, and universal, as any that can be stated in a court of justice, and there is nothing on which to supersede it in this case but a suggestion of some supposed inconvenience. It does not follow, it is said, that because the subscribing witnesses are the plighted witnesses to prove the execution, they must needs be the best witnesses, for others may know better or more of the transaction than they; but inasmuch as they are the plighted witnesses, the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming. It seems to me therefore, that unless we are to quit sight of the rule for the purpose of going into the *rationale*, or convenience and inconvenience of it in each particular case, as the ingenuity of persons may suggest, there is no reason for doing it in the present case. I confess that I am against the whole scope of the argument and its conclusions.

Per Curiam,

Order of Sessions confirmed.

Holbeck and Dwarris were in support of the order of Sessions.

Saturday,
Nov. 11th.

The KING *against* SOUTH LYNN, ALL SAINTS.

An order of removal made by two justices, upon the examination of the pauper taken by one of them, pursuant to stat. 49 G. 3. c. 124. s. 4. need not state the special circumstances of taking the examination, &c.

THE Sessions upon appeal confirmed an order of two justices for the borough of *King's Lynn, Norfolk*, removing *E. Smith*, widow, and her children, from

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St. Margaret's to South Lynn, All Saints, both in the said borough, subject to the opinion of this Court upon a case, which was to this effect:

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The order of removal was founded upon the examination of the pauper taken in writing before one of the said justices, and reported to the other, pursuant to stat. 49 G. 3. c. 124. s. 4., the pauper being at the time of her said examination sick and infirm, and unable to travel, and the justices suspended the order accordingly. The order and examination were annexed to the case. And the question made at the sessions was, whether this order was void, inasmuch as it omitted to set out that the examination was taken before one justice only, and was reported to the other justice, so as to shew the particular jurisdiction and authority of the justices under the statute.

Nolan, who was against the order of sessions, was called on by the Court; and he took exception to the order of Justices, that it appeared to be made upon the examination of the pauper, and that the examination contained hearsay evidence; and this defect, he said, being apparent on the face of the proceedings, the Court would now entertain it, although it was not the point submitted to them by the sessions. But the Court seemed inclined against entering upon this point, as it was not submitted to them by the sessions; and upon looking to the order it was found that it was made “as well upon the examination of *E. Smith* upon oath as otherwise;” so that the ground of this objection failed. Whereupon he argued as to the principal point, that before the stat. 49 G. 3. the justices, who made an order of removal, must have proceeded in all cases, except under

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the mutiny act, upon *viva voce* evidence, taken before them in each other's presence (a); and inasmuch as this was a particular jurisdiction given to the justices for a special purpose, and was contrary to the course at common law, they ought by their order to have set forth so much, as would shew that they had this jurisdiction.

LORD ELLENBOROUGH C. J. The justices have no jurisdiction at the common law, but only what is given to them by statute; and the argument is as if this were a proceeding contrary to the common law. It seems to me that the statute in question does not make it necessary for the justices to state the proceedings had under it, in their order.

LE BLANC J. The statute enacts, that in case the pauper is by age, or other infirmity, unable to be brought up to be examined as to his settlement, it shall be lawful for one magistrate to take his examination, and report it to another, and for those magistrates, upon such report, to adjudge the settlement; but I do not find that the statute makes any alteration in the form of the order.

Per Curiam, Order of Sessions confirmed.

Courthope was in support of the order of sessions.

(a) *Rex v. Wykes*, Str. 1092. *Rex v. Howarth*, 2 Bell. 640. *Rex v. Coln St. Aldwin*, Burr. S. C. 136. See also *Inter Inhabitants of Ware*, Salk. 488.

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The KING *against* The Inhabitants of ASHTON-
UNDER-LYNE.

Saturday,
Nov. 11th.

THE Sessions upon appeal confirmed an order of justices for the removal of *Margaret* the wife of *S. Mills* and three children from *Southcoates* in the East Riding of *Yorkshire*, to *Ashton-under-Lyne* in *Lancashire*, subject to the opinion of this Court on the following case:

In 1803 *S. Mills* being settled at *Ashton-under-Lyne*, and married to the pauper, enlisted into the king's service, and in 1809 deserted from it, leaving his wife and children in *Southcoates*. Afterwards the pauper took a house in *Southcoates* at 5*l.* a-year rent, and resided in it with her children to the time of her removal, which was a period of several years. During the time of her residence in this house she took another house from one *Dean*, at five guineas a-year rent, and put some of her husband's furniture into it, intending at the time to remove from the house where she was then living into *Dean's* house, but she never did remove, but underlet it to another person. *Dean* considered the pauper as liable for the rent, and at the expiration of the first quarter called upon her for payment of it. During this quarter her husband came to see her, and remained for seven weeks of it concealed in the house in which she resided. Both that house, and the house taken of *Dean*, were taken without the privity of her husband, but the fact of their having been taken was communicated to him at the time of this visit.

Where pauper's husband, being a soldier, deserted and left his family in the parish of *S.*, and the wife, during his absence, took a house at 5*l.* a-year in *S.*, and lived in it with her family, and also took another house at 5 guineas a-year, and put some of her husband's furniture in it, intending to remove thither, but never did remove, but underlet it; and during the time she held both, her husband came to see her, and remained seven weeks concealed in the house where she lived, and was made acquainted with her having taken the two: Held that the husband did not acquire a settlement by this residence.

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Dean never considered her husband as his tenant, nor ever knew of his being in existence. The question was, whether the pauper's husband acquired a settlement in *Southcoates*.

Scarlett, who was against the order of sessions, was called upon by the Court, and argued that the husband gained a settlement by residing on this tenement for 40 days. For residence is the thing that determines whether any one came to settle in a tenement within the meaning of the statute 13 & 14 *Car. 2.*; and if he resides 40 days irremovably, this is a coming to settle, without regard to the particular cause for which he came there. As if a man take a tenement, or employ an agent to take one for him, with the purpose of secreting himself, and reside in it 40 days, this shall gain him a settlement; and it is the same whether he pay rent for it or not. So here, the wife contracted as agent of the husband, or at least the husband became responsible to the landlord upon her contract; in like manner as in *Jones v. Chambers*, coram Lord *Ellenborough* C. J., where the wife, during the absence of the husband abroad, took a house and contracted with the plaintiff to furnish it, who afterwards sued the husband upon this contract; the defence was the adultery of the wife, upon which the defendant succeeded; but his Lordship left it to the jury, that supposing they should not find the adultery, they were to consider whether as the husband neglected to pay her maintenance, the wife did not go clothed with a credit for which he was responsible. And here the husband adopted the contract, for when it was made known to him he did not repudiate, but on the contrary took the benefit of it by continuing

tinuing to reside there; so that he *came to settle in the tenement* within the statutable sense of that expression, that is, he resided there irremoveably; for although he was a deserter, and came there with the object of concealment, yet the parish-officers could not have removed him on that account.

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LORD ELLENBOROUGH C. J. This is a new head of settlement *latitando*; but it appears to me that it would be a gross perversion of terms to say that this pauper came to settle in a house, when he only came to it for the purpose of concealing himself from the search of those who had a right to his service, and when the most that can be said of his residence is, that the wife does not turn him out. But the wife was the ostensible party; she it is that makes the contract in her own name, and nothing is ever done on the husband's part to ratify it in any way. His coming into the parish therefore was nothing better than the mere intrusion of a fugitive who is lurking in hiding-places, and was not in any sense a coming to settle, that is, not a coming into the parish *animo residendi*.

LE BLANC J. What the statute requires is a coming to settle in a tenement; the construction of which has been that a person who comes into a parish to reside in a tenement must have some kind of interest in it. But in this case the husband had not any interest; for he neither took the tenement himself nor by his agent; but the wife took it for herself in the absence of the husband, and without his privity or even his knowledge. Afterwards the husband comes home to his wife, not knowing that she has entered into any contract, and

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resides with her for a time, during which it is communicated to him that she had made the contract. This is the whole of the case, and it does not appear to me to follow that the husband must be considered as having come to settle in this tenement, because he may be liable in respect of his wife's occupation. The contract of the wife was fraudulent, for the landlord was never made acquainted that she had a husband, and never knew or adopted him as tenant; he might have declined the contract altogether, or put an end to it, had he been informed that she was a married woman. It seems to me that under these circumstances there was nothing to prevent the parish-officers from removing him.

BAYLEY J. I am entirely of the same opinion. It was never the intention of the landlord to let the tenement to the husband.

Per Curiam,

Order of Sessions confirmed.

Marryat was in support of the order of sessions.

Monday,
Nov. 13th.

SMITH *against* INNES.

Defendant discharged on common bail, and notice of declaration set aside, on the ground of a misnomer in the christian name, upon application made before the time for pleading in abatement expired.

A RULE nisi was obtained for discharging the defendant on common bail, and setting aside the notice of declaration, on the ground that the defendant was misnamed in the process, *James* instead of *John*, which latter name, the affidavit stated, "was his true name, and by it he had always been called and known." *F. Pollock*, who moved the rule, cited *Wilks v. Lorck* (a)

(a) 2 Taunt. 399.

as an authority in point; and distinguished *Binfield v. Maxwell* (a), because there the application was made after the time for pleading in abatement had expired; which was the ground upon which the Court discharged the rule.

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Richardson now shewed cause, and referred to *Salter v. Shergold* (b), and *Stevenson v. Danvers* (c), where the Court refused to order the bail-bond to be delivered up on the ground of a misnomer. In like manner this is properly matter for plea in abatement, for it is not suggested that the defendant is not the person really intended to be sued. And he produced an affidavit by which it appeared that the defendant had executed a bail-bond written in the name of *James Innes*, and subscribed by him with the initial *J. Innes*; but it did not appear that he knew his name was written *James* in the bond.

LORD ELLENBOROUGH C. J. It is right that the party should have this remedy. The remedy by plea in abatement is a late one, and insufficient. The defendant however must undertake not to bring any action.

BAYLEY J. The defendant does not ask to set the proceedings aside with costs,

Per Curiam,

Rule absolute.

(a) 15 *East*, 159.

(b) 3 *T.R.* 572.

(c) 2 *B. & P.* 109.

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Tuesday,
Nov. 14th.

ROE, on the Demise of THONG, *against* BEDFORD.

Devise to his wife for life, remainder to trustees, &c. remainder to his daughter for life, remainder to trustees, &c. remainder to the heirs of her body; and for want of such issue, remainder over in fee; it being his will and meaning, that after the decease of his wife, his daughter should have only an estate for life, and that after the decease of his wife and daughter the premises should go to and vest in the heirs of the body of his daughter; and for want of such issue, should go over in fee, and that his daughter should not have any power to defeat his intent: Held that the daughter, notwithstanding, took an estate tail, and barred the remainder over by suffering a recovery.

UPON a case reserved at the trial of this ejectment, at *Huntingdon*, the facts, as far as concerns the point determined by the Court, were these:

Walter Thong, being seised in fee, on the 13th of *August* 1768, devised the premises in question to his wife for life, subject to the payment of an annuity of 10*l.* to *J. H.* during the life of his wife, with which he charged the premises; and after the determination of that estate, to trustees to preserve contingent remainders; “and from and immediately after the decease of my wife, I devise the said messuages, &c. to my daughter *Elizabeth*, the wife of *J. Bedford*, (the defendant) for life, subject to the payment of the said annuity, with remainder in like manner to trustees to preserve contingent remainders; and from and immediately after the decease of my said daughter, I devise all and singular the said messuages, &c. to the heirs of her body lawfully begotten; and for want of such issue, then I devise the same to my grandson *O. W. Thong* and his heirs and assigns for ever; it being my will and meaning that after the decease of my wife, my daughter should have only an estate for life in the said premises, and that after the decease of my wife and daughter, the said premises should go to and vest in the heirs of the body of my daughter; and that for want or in default of such issue the same should absolutely go and vest in *O. W. Thong* and his heirs, and that my daughter should not have any power to defeat my intent and meaning in this respect.” And

he gave power to the trustees and their heirs, and directed them, from time to time and at all times thereafter, to do all acts necessary for fulfilling such his intent and meaning, or the more effectually settling the said premises agreeably thereto, and the prevention of any thing being done to defeat the same, &c. The testator died, leaving his widow, and *Elizabeth*, his only child, then married to the defendant. Afterwards the widow died, and the defendant and his wife *Elizabeth* suffered a recovery of the premises to such uses as *Elizabeth* should by deed or will appoint; and she, by her will, appointed the premises to the defendant in fee, and died, never having had issue.

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And the question was, whether under this devise *Elizabeth*, the daughter, had an estate for life, or in tail.

Storks, for the plaintiff, argued that *Elizabeth* was only tenant for life, and consequently was not entitled to suffer the recovery. For the rule, he said, in *Shelley's* case (a) has never been held so inflexible, that the words *heirs of the body*, which would, according to that rule, be words of limitation, may not be otherwise explained in a will by the testator himself (b). Accordingly it appears by *Colson v. Colson* (c), *King v. Mel-ling* (d), *Backhouse v. Wells* (e), *Perrin v. Blake* (f), *Bagshaw v. Spencer* (g), that the rule may be relaxed in favour of the intention, and the words *heirs of the body*, after an estate for life to the first taker, may be construed words of purchase. And although Lord

(a) 1 Rep. 104.

(b) Per Lord Kenyon, *Goodtitle v. Herring*, 1 East, 272.

(c) 2 Atk. 246.

(d) 1 Vent. 231. cited 2 Burr. 1107.

(e) Eq. Cus. Abr. 184. pl. 27. 10 Mod. 181. cited 2 Burr. 1107.

(f) 1 Bl. R. 672. 4 Burr. 2579.

(g) 1 Ves. 142.

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Hardwicke determined the case last cited upon a distinction betwixt a devise of a trust and of a legal estate; yet it appears that he afterwards abandoned that distinction (a); so that it is now agreed that the same construction shall hold as well where it is a legal estate as where it is a trust. The result then of the cases seems to be this, that where the intention of the testator is manifestly to give an estate for life to the first taker, and that the second should take by purchase, this intention shall prevail, notwithstanding the deviser has described the person who is to take after the devisee for life, by the words *heirs of the body*. And so in the case at bar *Elizabeth* had an estate for life only, because the deviser has plainly expressed his intention to give her such estate; first, affirmatively, by limiting it to her for life; and, next, negatively, by declaring that she shall have that estate only; and further, by distinguishing her life estate from the remainder to the heirs of her body, by charging the one, and omitting to charge the other, with the payment of the annuity; and also by restricting her power to defeat his intent; and therefore this shall take the case out of the general rule, and turn the words *heirs of the body*, which come after the estate for life, and are commonly used as words of limitation, into words of purchase.

LORD ELLENBOROUGH C. J. If we should be of opinion that *Elizabeth* the daughter took an estate tail, there is an end of this case. And it appears to me that under this devise an estate tail in remainder vested in

(a) *Garth v. Baldwin*, 2 Ves. 646.

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her. The rule is, I think, well and shortly laid down by Lord *Thurlow*, in *Jones v. Morgan* (a), who said that "By all the cases where the estate is so given, that after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word heirs must be a word of limitation." It seems to me, following this construction, that this must be an estate tail in the daughter, in order to effectuate the intention of the testator, which was, that all her issue should take. And this puts an end to the case without going into any other point (b).

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LE BLANC J. The plain intention of the testator was to give his daughter an estate tail; for it was not to go over until there was a failure of her issue, and he has not superadded words of limitation to the heirs of her body, to shew that he meant the children of his daughter only. At the same time he intended to prevent her barring the issue; but this he cannot do.

BAYLEY J. I am of the same opinion. In *Colson v. Colson* it was determined that an estate tail vested in the first taker, notwithstanding it was devised to him for life, with remainder to trustees to support contingent remainders. I have always understood the rule to be, that wherever an estate for life is given to the first taker, and afterwards to any branch of his heirs as a class, so that the whole line of heirs to the first taker, who answer to the description in the will, should succeed him as such, there the first taker cannot have an estate for life, be-

(a) 1 Br. Ch. Cas. 219.

(b) There was another point made in argument upon the effect of a scoffment by the defendant, and fine afterwards levied to him.

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cause all heirs claiming as heirs must take by descent; and therefore the words "heirs of the body" do not operate as a *designatio personarum*, but are words of limitation. The words *heirs of the body* are properly words of limitation, and not words of purchase.

DAMPIER J. It seems clear by the limitation over for want of issue of his daughter, that the testator used *heirs of the body* as words of limitation. It has already been determined that this is a devise of a *legal* estate (a), and Lord Hardwicke in *Bagshaw v. Spencer*, when he took a difference betwixt a *trust in equity* and a *legal* estate, agreed that upon a devise of a mere *legal* estate, the words must be taken as they stood, according to the strict legal determination.

Judgment for the Defendant.

Frere Serjt. was for the defendant.

(a) *Thong v. Bedford*, 1 Br. Ch. Cas. 313.

Tuesday,
Nov. 14th.

ROE, on the several Demises of ALLPORT and Others, against BACON.

Devise to wife of "all and singular my freehold lands, messuages, and tenements at, &c. or elsewhere, together

with all my household goods, &c. for life, and after her decease then all *the said estates* goods, &c. to be divided among my sons (naming five) share and share alike;" held that the sons took a fee in the lands after the death of the wife, and that the estate of one of them was well devised to another, by a devise "of all *my proportionable share* which belongs to me, after my mother's death, to him and his heirs."

EJECTMENT. At the trial before Dallas J. at the *Staffordshire* assizes, a verdict was found for the plaintiff, subject to the opinion of the Court upon a case, the material facts of which are these:

John

John Bacon the elder being seised in fee, &c. devised to his wife *Ellen*, “all and singular my freehold lands, messuages, and tenements at *Tutbury* and *Hanbury*, or elsewhere, together with all my household goods, cattle, chattels, debts, and all my implements of husbandry, &c., for her natural life, and after her decease then all the said estates, goods, &c. to be divided among my sons *Thomas*, *John*, *Humphry*, and *Peter Bacon*, and my son-in-law *C. Tabberer*, share and share alike.” The testator died, and afterwards *John* the son, by his will, gave and bequeathed to his wife certain copyhold land, “and if my brother *Peter* should happen to be the longer liver after me and my wife, I give and bequeath to him my proportionable share, which belongs to me after my mother’s decease, to him and his heirs for ever.” *John* died, then *Ellen* the widow of the first testator died, and afterwards *John*’s wife died, and *Peter* survived, and devised to his wife (the defendant) for life, and died. And two questions were made, 1st, What estate the devisees took under the will of *John Bacon* the elder after the death of *Ellen* his widow. 2dly, Whether the estate of *John* the son passed by his will to his brother *Peter*; so as to pass by the devise of *Peter* to the defendant.

Peake for the plaintiff argued, 1st, that the devisees under the will of *J. B.* the elder took only an estate for life. For the word *estates*, which is the only word capable of enlarging the devise beyond a life interest, will not have that effect, because being used in the plural it shews that the testator did not mean by it to express the quantity of interest, but only the things which were the subject of the devise; in the same manner as if, instead of saying *all the said estates*, he had repeated all and singular

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singular my freehold lands, &c. at *Tutbury*, &c. or elsewhere; which, if he had done, would plainly have passed but an estate for life. In *Denn v. Mellor* (a) the words "lands, tenements, and hereditaments," were held to carry only a life estate; and it was long ago doubted by Lord *Hardwicke* whether *estates* in the plural denoted more than a description of the lands (b). It is true that this word has since been considered as equivalent to *estate* in the singular (c); and the latter word has been sometimes held, though not always (d), to carry a fee; as if it be coupled with the word *lands*, there is good reason why it should pass the interest, for if it meant nothing more than the lands, it would be useless, for the two words would mean but the same thing (e). But where *estates*, which according to its natural sense means the lands, is the only word of description, and particularly where it is joined with the word *said*, which is a word of reference, making the things to which it refers to be, as it were, incorporated into the devise, the same as if they were repeated in it, there is no reason for extending this word beyond both its natural and its relative sense. 2dly, The words "*my proportionable share*," are not sufficient to pass the estate of one brother to the other.

Lord ELLENBOROUGH C. J. If we were called on to construe this will with the same critical precision that would be prescribed to a grammarian, I should be much inclined to adopt the arguments of the learned counsel, because *the said estates* do seem in strictness to

(a) 5 T. R. 558.

(b) *Goodwyn v. Goodwyn*, 1 Ves. 229.(c) *Fletcher v. Smiton*, 2 T. R. 659.(d) *Denn v. Gaskin*, Cowp. 657.(e) *Roe v. Wright*, 7 East, 259.

refer

refer to the freehold lands, messuages, and tenements before devised, according to the rule, *verba relata inesse videntur*. But in cases of this sort unless the testator uses expressions of absolute restriction, it may in general be taken that he intends to dispose of the whole interest; and in furtherance of this intention courts of justice have laid hold of the word *estate*, as passing a fee, wherever it is not so connected with mere local description as to be cut down to a more restrained signification. Now in this case we find the word *estates*, which at this day may be taken to be equivalent to *estate* for the purpose of passing the whole interest, and really an argument is afforded from the company in which this word is found, why it should so mean. For the testator devises *all the said estates, goods, &c.* amongst his sons, which without doubt passed the entire property in the goods to them; wherefore by the aid of collocation the word *estates* may, I think, fairly be intended to comprehend the entire interest in the lands. And this falls in with the principle of the decision in *Roe v. Wright, East's Rep.*, which is not at all broken in upon by the former decision in *Doe v. Wright (a)* upon another clause of the same will, in which the word *estate* did not occur. Wherefore it seems to me that the devisees under this will took a fee after the death of the widow. Upon the other point, "my proportionable share" means all his interest.

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LE BLANC J. To hold the rule strictly, that in every devise of lands without words of limitation no more than] a life-estate should pass, would be to defeat in many

(a) 8 T. R. 64. 1 N. R. 335.

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instances the intention of testators; and the courts seeing this, have always been vigilant to lay hold of other expressions, and among them, the word *estate*, to prevent such a consequence. Here the word is *estates*. The testator first disposes of his lands, together with his goods, to his wife for life; afterwards he gives *the said estates, goods, &c.* to be divided amongst his sons. Now *estates* may mean as well the interest in the lands as the lands themselves, and here I think the court is justified in giving it the more enlarged construction.

BAYLEY J. It seems to me that *estates* might be meant as explanatory of what the testator intended by the words *all my freehold lands, &c.*; and although upon those words alone we should not have been warranted in saying that the whole interest passed, yet now that he has used the word *estates*, this may be interpreted to mean the quantum of interest as well as the land.

DAMPIER J. The estate devised to the five sons was to be divided among them: "my proportionable share" refers to such a divisible estate.

Judgment for the Plaintiff in
part, but not as to *John's*
and *Peter's* 5th.

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GRAHAM *against* ANDERSON.Wednesday,
Nov. 15th.

ONE of the bail in this case, a natural born subject of *England*, who was a housekeeper, was permitted to justify partly in respect of a landed estate in *Surinam*, and partly in respect of property in *England*. A late case of this sort before *Dampier J.* was mentioned. (a)

A native of *England* was allowed to justify as bail, in respect of property partly in *England* and partly abroad.

BAYLEY J. (the only Judge in court) observed that the Plaintiff might, by pressing the bail, compel him to render his property abroad available. But afterwards on the same day, he added that he had looked into the cases, and that they were contradictory (b); and that it must not be taken for granted, that a party can justify in respect of property abroad when he has no other property.

(a) See *Beardmore v. Phillips*, ante, 173.

(b) See *Smith v. Scandrett*, 1 Bl. R. 444. *Boddy v. Leyland*, 4 Burr. 2526.

DOR, on the several Demises of NEWNHAM and
Another, *against* CREED.Friday,
Nov. 17th.

EJECTMENT for certain messuages and premises situate in *Prescott-street*, in the parish of *St. Mary Matfellow*. At the trial before Lord *Ellenborough C. J.*

Devise of testator's reversion to J. N. for life, with power to jointure and raise portions

for younger children, remainder to his first and other sons, &c., with power to J. N. and those in remainder during their respective possessions, to make leases of the lands in *Sussex* and *Huntingdonshire*, for not exceeding twenty-one years, at the most rent; and of the lands in *Middlesex* and *London* for not exceeding sixty-one years, at the usual or other the most rent: Held that J. N. might well lease the lands in *Middlesex* upon a fine, and at a reserved rent, which rent exceeded the rent reserved upon a former lease in being at the date of the will, and at the testator's death, and upon which lease the then lessor had also taken a fine.

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at the *Middlesex* sittings after last *Hilary* term, there was a verdict for the plaintiff, subject to the opinion of the Court upon the following case :

John Newnham being seised in fee of the reversion, expectant upon the death of *E. Newnham*, of the premises in question, by his will dated 8th *October* 1757, devised all his manors, messuages, lands, tenements, farms, and hereditaments, and all his real freehold and copyhold estates, &c. in the counties of *Sussex*, *Huntingdon*, and *Middlesex*, and the city of *London*, and elsewhere in *Great Britain*, to his son *J. Newnham* for life without impeachment of waste, with power to charge his estates in *Sussex* with a rent-charge not exceeding 1000*l.* a year as a jointure, and with a sum of money by mortgage for younger children, remainder to the use of the first and other sons of the body of his son *J. N.*, &c., and he directed that it should and might be lawful to and for his son *J. N.*, and for all and every person and persons who should be entitled to, and inherit his said estates under the several limitations aforesaid, during their respective possessions, to grant leases of the same estates, or any part thereof, from time to time as occasion should require, that is to say, of all or any part of the messuages, tenements, farms, and lands, &c. in the counties of *Sussex* and *Huntingdon* for any term or terms of years not exceeding 21, so as there should be reserved by such lease or leases *the most rent* that can be got for the same, and of all or any part of the messuages, ground, and tenements in the county of *Middlesex* and city of *London* for any term or terms of years not exceeding 61, so as there shall be reserved thereon *the usual or other the most rent*, that can be had for the same, &c. The testator

tator died in 1764. *E. Newnham* died in 1767. Previously to the testator's death, viz. in 1741, the premises in question were demised by indenture in consideration of 100*l.* fine by Sir *W. Lemon*, (from whom both *E. Newnham* and the testator derived title,) to one *E. W.* by the description of all that messuage, &c. in *Prescott-street*, &c. habendum from *Christmas* 1744, for 41 years, at a reserved yearly rent of 6*l.* After the death of *E. Newnham*, *J. Newnham* the son being tenant for life, by indenture of the 25th of *May* 1772, in consideration of 150*l.* fine, and the surrender of the former lease, demised the said premises to one *Beale* for 61 years, at a reserved yearly rent of 10*l.* Afterwards four other messuages were built on the said premises, and by indenture of the 26th of *July* 1811, between the said *J. Newnham* and the defendant, *J. N.* in consideration of a fine of 315*l.* and of the cancellation of the former lease to *Beale*, demised the said premises by the description of all that piece, &c. together with five messuages, &c. for 61 years at a reserved rent of 10*l.* The said premises were at the time of granting this lease worth to be let for the term of 61 years, with the covenants, &c. contained in the said lease, and according to the usual covenants, conditions, and provisoes of letting in the parish where they are situate, 50*l.* per annum. The defendant entered, and is in possession; *J. Newnham* died, and the plaintiff is intitled to recover, if the said lease is void, as not being made pursuant to the power contained in the will.

The question for the opinion of the Court is, if the plaintiff is intitled to recover; if he is, the verdict to stand, if not, a nonsuit to be entered.

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Scarlett for the plaintiff argued that the lease was void, not being made in conformity with the power. For this power is to be expounded strictly according to the rule for the construction of powers; the reason of which rule seems to be, because powers are in abridgment of the rights of those in remainder; for which reason also, wherever the power is coupled with a condition, this being for the benefit of the remainder-man, the condition is to be strictly enforced. Now the condition in the case at bar is, that *there shall be reserved the usual or other the most rent*; and the lease is in consideration of a fine, and a reserved rent of 10*l*. That this is the most rent is negatived by the case; and then the question is, Is it *the usual rent*? Now it is for the defendant who sets up the lease to prove this. *Usual*, taken in one sense, may be said to signify such as has been before reserved; but this is not the sense in which it is used here; which will appear by reference to the power itself, and the reason of it. The power, as it respects the lands in *Sussex* and *Huntingdon*, is conditioned for the reservation of the most rent, absolutely; but as to the lands in *Middlesex* and *London*, it is for the reservation of the usual or other the most, in the alternative; the reason of which variation in the language of the condition was obviously to enable the tenant for life to grant *building* leases of the lands in *Middlesex* and *London* as occasion should require. Therefore as to these lands the language of the testator is, it may be necessary to grant building leases of the lands in *Middlesex* or *London*; and if it should be, then it cannot be expected that a rack or the *most rent* can be gotten for them; it shall therefore be enough in such an event to reserve the usual rent, that is, the rent which is usually

reserved upon building leases of other lands in the same neighbourhood; but if there be no necessity for a building lease, then the lands in *Middlesex* and *London* will stand in the same situation as the lands in *Sussex* and *Huntingdon*, and there can be no cause for taking a less rent for them than for the others; and therefore in that case the other alternative, that is, that the most rent shall be reserved, shall attach upon them as well as upon the lands in *Sussex* and *Huntingdon*. And this mode of construing the words of the condition *distributive*, will satisfy both alternatives, and is the only reasonable construction; for any other will defeat the benefit of the remainder-man, for whose benefit alone this condition was made. If it be asked, Is the tenant for life then precluded from taking any fine? it may be answered, he is not, provided that upon every building lease he reserve the usual or common rent of the neighbourhood, and upon every other lease the most rent. But as the defendant would have it, if the tenant for life has originally let these lands upon a building lease, at a mere nominal rent, he and every successive tenant for life may go on from time to time granting leases at the same nominal rent, however great the improved annual value may have become, and may exhaust the whole value of the term in himself by taking a fine to the utter disparagement of those in remainder. And this is to be done under colour of a condition which had for its sole object to secure the interests of those in remainder, and where the interest of the tenant for life is already provided for by the power given him to jointure and raise portions for younger children.

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Lord ELLENBOROUGH C. J. Unless we found something in the language of this power pointing at the neighbourhood as the test of what should be considered the *usual* rent, we cannot embark this idea of it into the question. *Usual* in its ordinary sense must mean usual to be letten with reference to the subject to be letten. When the testator authorized the granting of leases of the lands in *Middlesex* and *London* for 61 years, he might possibly do this with a view to repairing leases, such as leases of houses in *London* frequently are. The testator however must have contemplated that a fine would be taken; for the lease stood originally, in his time, at a rent of 6*l.* a-year with a fine. Afterwards we find the rent was increased to 10*l.*, and it now stands at that rent. Therefore the interest of the remainderman has been improved; for the rent has become a better rent. It is something more than the usual, though less than the most; but it may be either usual or most. Suppose these lands had become situate in a ruinous part of the town, in such a case the tenant for life might not have been able to get the usual rent; and then he was to get the most. The devisor had two descriptions of property; that which lay in *Sussex* and *Huntingdon*, for which he provided that *the most* rent should be reserved, as upon an agricultural lease, where the annual produce of the land might be supposed to afford to the remainder man a full rent; the other description of property he allows to be let for a longer term, and at *the usual or other the most rent*. And for this property we find that a fine has always been taken; and that upon the two last leases the rent has been increased. Is it not then the *usual* rent? It is the usual and something more; it is inclusive of the usual, being

the usual and more. It seems to me therefore that the terms of this power have been complied with; and that nothing has been done but what the person who created the power must have contemplated; the property having been before let on fine at a reserved rent. Here it has been let on fine, and at a greater than the usual rent.

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LE BLANC J. Looking at the situation of the testator's property as it is stated on the case, and also at the language which he has used, who is the framer of this power, I am unable to give to it any other construction than that which has been given by my Lord. The testator must have been aware at the time of creating the power that this property was on lease at a fine and a reserved rent; and he makes a distinction in the terms of the power, as it applies to the different descriptions of property which he disposes of. As to that in *Sussex* and *Huntingdonshire*, he says, *the most rent*; but when he comes to the property in *Middlesex* and *London* he introduces another term, by saying *the usual or other the most rent*. If his object had been to prevent the taking of a fine upon the lease of the lands in *London* and *Middlesex*, and to require that the remainder-man should have the most rent, he had no occasion to vary the phrase in respect of these lands, from that which he had used in respect of the lands in the two other counties. Therefore by introducing the term usual, he certainly meant to secure to the remainder-man as much rent as before, but he also meant to give the tenant for life power to take a fine. It might happen, however, that some part or the whole of this property might become so situated, as not to fetch the usual rent, and if it

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it had stood upon the term *usual* alone, the power of leasing would be gone; he has therefore added to the term “usual” “or other the most rent.” Wherefore this lease seems to me to be well sustained by the power.

DAMPIER J. in the course of the argument said, that he had always considered *usual* in these powers as contrasted to *most*.

Per Curiam,

Judgment of nonsuit. (s)

Burrough was to have argued for the defendant, but the Court stopped him at the outset of his argument.

(s) As to the taking a fine, see *Right v. Thomas*, 3 Burr. 1440. As to the construction of the words *usual rent*, see *Morrice v. Antrobus*, Hardr. 325. *Orby v. Mabun*, 3 Chan. R. 56. 66. 68.

Saturday,
Nov. 18th.

The KING *against* The Inhabitants of STANDARD HILL.

An appointment by two justices of overseers of the poor, may be removed into this Court by certiorari, without appealing against it to the Quarter Sessions, and this Court will go into the question upon affidavit, whether the place for which the appointment is made be a township or vill, and if it appear by the affidavits that it is not, and be not stated to be such, or that it is reputed to be such, the Court will quash the appointment.

BY an order of two justices, two persons named therein substantial householders of the township of *Standard Hill* were appointed overseers of the poor of the said township; which order being removed by certiorari, a rule nisi was obtained for quashing it. The affidavits in support of the rule set forth, that *Standard Hill* is a close or piece of ground within the precincts or liberties of the castle of *Nottingham*, which before

the

the year 1807 was let out in gardens, but in that year was sold by the Duke of *Newcastle*, the owner of the castle, and then for the first time had several dwelling-houses built upon it. Before that time the high constable for the hundred within which the castle is situate, used to issue his precepts and serve them at the lodge of the castle, and obtained returns to such precepts of the inhabitants living within the precincts from the porter at the lodge. After the erection of the houses the high constable directed the porter to attend a meeting of magistrates for the county to be sworn in constable, which he accordingly did in *Sept.* 1808, and was upon the application of the said high constable appointed and sworn in constable for *Standard Hill* for the year ensuing; but this was done without the knowledge of the Duke, or his steward, or any of the inhabitants of *Standard Hill*, who refused to make good to him payments which he had made to the high constable for assize and sessions bills, returns of taxes, &c., alleging that they were not liable to the appointment of any constable, or other civil or parochial officer, or to the payment of any such charges; and in consequence of orders from the steward a constable had not been sworn in or acted since *April* 1814. *Standard Hill*, and the castle with all its precincts and liberties, were always deemed to be extra-parochial, and no part of it was ever reputed to be a township or vill, or assessed, or liable to be assessed, to the relief of the poor, or ever had a constable, or overseers of the poor, or other civil officer, appointed, except as above stated. A chapel was built on *Standard Hill*, by private subscription, for the celebration of divine service according to the rites of the church of *England*, in pursuance of an act of the 47th
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of the King, intituled "An act for erecting a chapel on certain extra-parochial land called *Standard Hill*," &c.; which act contained a proviso that nothing therein should extend to make any new parish, or to alter or affect any tithes or other ecclesiastical payments, or any rates, taxes, assessments, or other payment whatsoever, &c.

In answer to this it was stated upon affidavit, that *Standard Hill* now consisted of more than 17 dwelling-houses, occupied by substantial householders eligible to serve the office of overseer, and that there were various other houses there, occupied by respectable housekeepers, and other buildings in progress, and the number of its inhabitants was upwards of 140, and upwards of 36 menial servants were resident there.

Topping and *Denman* shewed cause against the rule for quashing the order; and first they objected that the Court would not try this question upon affidavit, but would rather leave it to be tried by appeal to the quarter sessions, which was the proper forum to determine whether this is a place for which overseers ought to be appointed. For this appointment is not impeached for any defect upon the face of it, or for that the justices making it had not jurisdiction, or have abused their office; which might have been a ground for the Court to quash the order (a); but here it is admitted that the justices had jurisdiction, and have fairly decided upon the merits; and whether they have done so correctly, is properly matter for appeal to the sessions, and not for this Court in the first instance.

(a) *Rex v. Great Marlow*, 2 East, 244. *Rex v. James*, ante, vol ii. 322. per Bayley J. *Rex v. Overseers of Bridgwater*, Cowp. 139.

And

And if the Court may try upon affidavit whether this be a vill or not, they may try any other question, as whether the persons appointed be or be not substantial householders; or if this had been an order of removal, whether the pauper was chargeable or not: all which questions have hitherto usually been determined by the sessions. Wherefore for avoiding such consequences it is better that the rule should be adhered to, that what is properly matter for the sessions should be determined at the sessions, and not by coming to this Court in the first instance; and it seems that this is so peculiarly a matter for the sessions, that whenever they adjudge a place to be a township or vill, this Court will not, even upon a case stated, go into the question (a). So if the sessions confirm overseers' accounts, this Court will not try the merits upon affidavit (b). 2dly, Supposing the Court will now entertain the question, it is submitted that this is *a township or village* within the intent of the statute 13 & 14 Car. 2. c. 12. s. 21. For though the affidavits do not name it such, yet they state sufficient from which to draw this conclusion; for they state that the place contains 17 dwelling-houses, of substantial householders, and other inhabited houses, and also others in progress, and that the number of inhabitants exceeds 140. And according to Lord Coke's definition (c), a vill is a place consisting of many mansions and neighbours; and it seems that although there be but one or two houses only, yet it may be a vill by reputation (d); and that wherever there is a large assemblage of houses, reputation is not necessary: for a place may become a vill in fact, though

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(a) *Rex v. Ronton Abbey*, 2 T. R. 207.(b) *Rex v. James*, ante, vol. ii. 321. (c) *Co. Lit.* 115. b.(d) See *Rex v. Overseers of Eyford*, Cald. 542.

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it be not so immemorially (*a*), the intent of the statute being, that as soon as it becomes a vill the justices may appoint.

LORD ELLENBOROUGH C. J. The extensive consequence to which a decision founded upon the argument of to day would lead, makes one pause, and require that it should be distinctly stated upon the affidavit that this is a vill or township *de facto*. For the immediate consequence of our holding this to be a vill for which overseers ought to be appointed would be that overseers must be appointed for all the inns of court and every collegiate or ecclesiastical establishment, which would work a great alteration in the laws relating to this subject. This consideration makes me unwilling to pass the ancient limits unless warranted by positive affidavit, and therefore until I find it stated that this is a vill, I shall defer coming to such a conclusion, which may lead to so extensive a consequence.

LE BLANC J. Where we see that the order which is removed into this court has been made without any foundation to support it, I think we ought to quash it, without giving the parties the opportunity of going to the sessions. I cannot find any thing in the affidavits that justifies the calling this either a township, hamlet, or vill, for the place appears to be part of the old castle of *Nottingham*. The Court then I think is bound to interpose in the first instance, and save the parties from the chances of what might happen at the sessions.

Per Curiam,

Order quashed.

Clarke and Abbott were against the order.

(*a*) See *Dolting v. Stokelane*, *Fortes.* 219.

1815.

The KING *against* The Inhabitants of Bow, *Saturday,*
otherwise NYMETT TRACEY. *Nov. 18th*

UPON appeal, the quarter sessions for the county of Devon quashed an order of justices for the removal of *John Hawkins* from *Bow*, otherwise *Nymett Tracey*, to *Okehampton*, subject to the opinion of this Court on the following case:

The pauper on the 24th of *January 1767*, when he was nearly eight years old, was bound as a parish apprentice by indenture to one *Sillifant* of the parish of *Northtawton*, to serve until he attained the age of 24. He served accordingly until within a short time of his attaining the age of 21, when his master being about to leave *Northtawton*, and no longer wanting the pauper's service, told him that he might leave him, and go where he liked, and shift for himself, but that if he could not provide for himself he might return to him. Upon this the pauper quitted *Sillifant*, but his indentures were not given up to him, nor cancelled, nor was any thing said about them. Upon quitting *Sillifant* he hired himself to another person in *Northtawton*, and served until nearly four months after his being of age, when without any communication with *Sillifant* he bound himself as an apprentice by indenture to one *Webber* at *Okehampton* for three years, to learn the business of a tanner, to which indenture his father was a party as a security for his service. Under this indenture he served *Webber* at *Okehampton* for the three years. And the question was, whether the pauper acquired a settlement by this service with *Webber* at *Okehampton*.

A parish apprentice was, before the passing of stat. 18 G. 3. c. 47., bound till twenty-four, and served till nearly attaining twenty-one, when his master, being about to leave the parish, and no longer wanting his service, told him that he might leave him and go where he liked, and shift for himself, but if he could not provide for himself he might return to him, upon which he quitted, and when he was about four months past twenty-one bound himself by indenture as apprentice to another master for three years, and served with him the three years: Held that he did not acquire a settlement by service under the second indenture

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Peake in support of the order of sessions argued that he did not. For the original indenture with *Sillifant* being made before stat. 18 G. 3. c. 47. was good to bind the pauper until his age of 24, and nothing was done to discharge it; for in the case of a parish apprentice under age the indenture cannot be discharged by his consent alone, but the parish officers also ought to give their assent; neither does the apprentice's coming of age render his consent given during nonage good to discharge the indenture (a). And it seems that in no case can an indenture of apprenticeship be discharged, but by being actually cancelled (b), or delivered up (c), or by something done which is equivalent, as the payment of money (d); whereas so far was this from being the case, that the pauper was told that he might return to his master. Also, the indiscriminate leave of the first master to go whither he liked, and shift for himself, did not make the pauper's service with the second master a service under the indenture with the first, because the leave must be applied to a particular service, and not general to serve any person (e). Nor can it be said that here the pauper has elected to vacate this indenture upon attaining his full age, as by law he might do (f); for where the binding is under the authority of an act of parliament, this takes away the power of electing to vacate the indentures (g); besides, the pauper did no act after coming of age to signify his intention

(a) *Rex v. Austrey*, Burr. S. C. 441. *Rex v. Langham*, Cald. 126.

(b) See *Rex v. Langham*, Cald. 126.

(c) See *Rex v. Holy Trinity*, 3 T.R. 605.

(d) See *Rex v. Justices of Devon*, Cald. 32.

(e) See per Lord Kenyon, *Rex v. Shebbear*, 1 East, 75.

(f) *Ex parte Davis*, 5 T.R. 715. (g) Per Lord Kenyon, 5 T.R. 716.

to vacate the indenture, or give notice of it to his master; for the merely deserting it is not sufficient.

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Gifford, contra, argued that the first indenture was at an end, and therefore the pauper acquired a settlement in *Okehampton* under the second. For a parish indenture, notwithstanding it is made under the authority of the stat. 43 *Eliz.* may be vacated, after the apprentice attains his full age, by agreement between the master and apprentice; and this may be done without either cancelling or giving up the indenture (a); and the payment of money is no farther material than as it serves to shew that the parties agreed to vacate the indenture, which may be evinced by other circumstances as well as this; as if the apprentice by the consent of his master enters into an engagement inconsistent with the continuance of his former obligation, this shews that the parties meant to put an end to it; the intention being evidenced by the act done; after which if an action had been brought by the master on the indenture, this would have been a good defence. Or take it that the first master might have avoided the second indenture, yet he has not done so, and therefore a settlement was acquired under it; besides, as the second indenture endured for nearly four months after the expiration of the first, and the pauper served under it, there was a sufficient period of service under an indenture which was no longer voidable to gain him a settlement.

LORD ELLENBOROUGH C. J. If the pauper was not in a condition to convey to *Webber* a present right to

(a) *Rex v. Ecclesal Bierlow*, Burr. S. C. 562. 1 Bl. R. 592. S. C. *Rex v. Harborton*, 1 T. R. 139.

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his service at the time when he bound himself by indenture to him, I am at a loss to discover how it could enure as a valid binding afterwards. Now at the time when the second indenture was made, the first master had not parted absolutely with the apprentice, though I agree that he had done that which might be an answer to any action by him on the indenture, or for harbouring his apprentice. Still this being but a parol agreement on his part that the apprentice might go whither he would, the master might by parol resume what he had granted by parol, the relation which had been created by deed not being capable of being dissolved by parol. The original indenture therefore still subsisted both as to master and apprentice: as to the master, because he might revoke his licence and resume his authority; and as to the apprentice, because if he was unable to provide for himself, he was at liberty to return.

LE BLANC J. The difficulty of maintaining that here was a good binding to *Webber* at *Okehampton* is, that at the time of the binding there does not appear to have been any dissolution of the first contract; on the contrary, both parties contemplated that it still subsisted; for the licence given to the apprentice was to go and see if he could shift for himself; and if he could not, he was to return under the indenture. There was a very sufficient reason therefore for the not giving up the indenture, in order that the parties might have the benefit of it.

BAYLEY J. Unless the first indenture was at an end when the pauper entered into the second, he was not
at

at that time *sui juris* to contract; which I take to be the question; and that to say the second indenture was only voidable is no answer to it.

Per Curiam, Order of Sessions confirmed.

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BULLARD *against* HARRISON.

Tuesday,
Nov. 21st.

TRESPASS, on 1st of *January* 1810, and on divers days, &c., for breaking and entering two closes of the plaintiff in the parish of *Canewdon, Essex*, called *Shorts* and *Mill Hatch*, that is to say, 200 yards in length and 20 yards in breadth of each of the said closes, in those parts thereof lying respectively on the westerly side of and near to a certain ditch or bank separating the said closes from a certain cartway, which communicates with a certain public highway, &c. and with feet in walking, &c.

2. Count for breaking and entering certain other closes, to wit, *Mill Hatch* and *Shorts*, and with feet, &c.

Pleas, not guilty. 2d, As to breaking and entering the closes in 1st count, in those parts thereof lying respectively on the westerly side of and near to the said ditch or bank separating the said closes from the said cartway, &c., that the defendant long before and at the said several times when, &c. was seised in his demesne as of fee, and also in the occupation of a farm called *Bolt Hall* farm, contiguous to the said closes, and prescribes in a *que estate* for a way on foot and with horses and carriages, from a certain common king's highway in the said parish, into, through, over, and along the said closes unto the said farm, and from thence back

A person who prescribes in a *que estate* for a private way, cannot justify going out of it on the adjoining land, because the way is impassable,

A way of necessity cannot be pleaded generally, without shewing the manner in which the land, over which the way is claimed, is charged with it.

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again; and that before the said several times when, &c., to wit, on the 1st of *Feb.* 1793, one *E. K.* then and for a long space of time, to wit, for the space of 13 years next afterwards, being the occupier of the said two closes, by means of certain hedges, ditches, and fences by him for that purpose planted, made, and erected, inclosed a certain small part, (to wit) of the breadth of 8 feet only, of each of the said closes, and separated and cut off the same from the rest of the said two closes respectively, and set out the same for the use of the persons occupying the said farm in their enjoyment of the said right of way, such way so set out and inclosed being thereby rendered liable to want reparation and amendment, from time to time, which it thereupon became the duty of the said *E. K.* as occupier of the said closes, and having so set out and inclosed the said part of each of the said closes for the use of the persons occupying the said farm in their enjoyment of the said right of way, and of all future occupiers of the said closes who should keep and continue the said hedges, &c., to make and cause to be made at his and their own proper costs and charges; and the said *E. K.* from the time of his so inclosing, &c. until the time when he quitted the occupation of the said closes, always at his own proper costs and charges repaired and amended the way so set out, &c., and every part thereof, as often as the same was required; and afterwards, and long before the said several times when, &c. the said *E. K.*, to wit, on 25th *March* 1805, quitted the occupation of the closes, and the plaintiff became, and was, and still is the occupier thereof, and kept and continued the hedges, &c. And afterwards, and long before the several times when, &c. the said way became and was foundrous and impassable, so

that

that the defendant and his servants, occupiers of the said farm, were necessarily prevented from using the same; and the defendant thereupon gave notice to the plaintiff, and requested him to repair the same, which he refused; wherefore the defendant being so seised, &c., and having occasion to use the said way, &c., did, at the said several times when, &c., of necessity turn out of the said way, and pass on foot and with his servants and horses, &c. out of that way into those parts of the said closes lying respectively on the westerly side of and near to the said ditch or bank, &c. for the purpose of obtaining a way to the said king's highway, and did pass and repass along those parts of the said closes into the said king's highway, and from thence back again to the said farm, as he lawfully might, going on those occasions as near to the way so set out and inclosed as he possibly could; and in so doing did necessarily and unavoidably, &c.

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3d Plea, that the defendant long before and at the several times when, &c. was and still is seised in his demesne as of fee, and also in the occupation of *Bolt Hall* farm, contiguous to the said closes in which, &c., and that the defendant not having any way to his said farm, otherwise than from and out of the said king's highway into, through, over, and along the said closes, by reason thereof, and being so seised, at the several times when, &c., necessarily had, and of right ought to have had, and still of right ought to have, and all the occupiers of the said farm necessarily have had, and of right ought to have had, a certain necessary way for himself, and themselves, and his and their servants, farmers, and tenants, occupiers of the said farm, to pass and repass on foot, and with horses, carts, and carriages, from the

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said king's highway into, through, over, and along the said closes, unto and into the said farm, and so from thence back again, at all times of the year at his and their will and pleasure, for the necessary use and occupation of the said farm, the same way being the nearest and most convenient way over the said closes from the said king's highway to the said farm; and so the defendant pleads the inclosure by *E. K.*, and continuance by the plaintiff, and justifies as in the former plea. Pleas to the second count respectively similar to the two above set forth.

Demurrers to all the pleas, and joinder.

Marryat in support of the demurrers took exception to the pleas, that the defendant who claims but a private way cannot charge the plaintiff with repairing it, without shewing that he is bound *ratione tenuræ*, or by prescription, or express stipulation; for by the common law he who has the use of a thing ought to repair it. And here nothing is alleged in pleading of any prescription, &c., but only that a former occupier did in fact repair it. Neither can the defendant justify going upon the adjoining land, because the way was impassable; for this right extends not to private ways, but to public ways only. (a) Neither is this well pleaded as a way of necessity, in general terms, because every way of necessity must originate in grant, or prescription which supposes a grant, or implied reservation, where the same person was seised in fee of all the closes *simul et semel*; and therefore a title ought to be set forth.

(a) *Taylor v. Whitehead*, Dougl. 745.

G. Marriott,

G. Marriott, *contra*, argued that it sufficiently appeared by the pleas that the way had been narrowed by the inclosure of it, and was thereby rendered liable to want reparation; consequently that the plaintiff by reason of this inclosure was bound to repair it; and the defendant might lawfully go on the adjoining land, if the way was impassable for want of such repair. For without insisting in conformity with *Com. Dig. (a)*, and *Black. Com. (b)*, for this right in every case of a private way, it is enough if in the case of a way of *necessity* it shall be found to exist: and that this question requires consideration, appears to have been the opinion of *Buller J.* in *Taylor v. Whitehead. (c)* In *Henn's* case (*d*) the Judges agreed, that if a man inclose, where he may by law, he is bound to leave a good way, and also to keep it in continual repair at his own charge, and the country ought not to be contributory thereto. And as to this not being well pleaded as a way of necessity, it is laid down "that if there be but one road to a place, and no other way of going, that is a way of necessity (*e*);" or, "if one sells land, and afterwards the vendee by reason thereof claims a way over part of the plaintiff's land, there being no other convenient way adjoining, this is a lawful claim, because it is a thing of necessity." (*f*) So that this plea, which generally describes it as a way of necessity, does all that is required; and the plea does not admit another way, as in *Reynolds v. Edwards (g)*, for which reason it was holden ill. But granting that it is defectively pleaded, yet advantage cannot be taken

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(a) *Chimin. D. 6.* (b) *2 Bl. Com. 36.* (c) *Dougl. 749.*
 (d) *Sir W. Jones, 296.* (e) *Chichester v. Lethbridge, Willes R. 71.*
 (f) *Clark v. Cogge, Cro. J. 170.* (g) *Willes R. 282.*

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of this on general demurrer; as if a bargain and sale be pleaded, without a consideration, this shall be good on general demurrer. (a)

Lord ELLENBOROUGH C. J. This record is full of a vast number of prurient novelties in pleading, and there is one that has not been touched upon in argument. For what is alleged in these pleas, that the defendant is seised in fee and also in the occupation of the farm, every pleader knows is not usual nor necessary, for the alleging a seisin in fee virtually includes an occupation, unless the contrary be shewn. Then as to this being well pleaded as a way of necessity, it is pleaded as such without shewing any unity of possession or prescription, whereby the land over which the way is claimed, became chargeable. If this were sufficient, as well might it be pleaded, without more, that the defendant had a right to pass over the *locus in quo*. It seems to suppose that whenever a man has not another way, he has a right to go over his neighbour's close. But that is not so. This is a sort of novelty in pleading which the Court cannot approve, considering that the rights of persons to things real are better preserved and cherished by maintaining the rules of good pleading than by almost any other thing that can be instanced. The question intended to be agitated upon this record is, whether in the case of a private way the grantee may break out, and go extra viam, if it be impassable, as in the case of a public way. As to that, I consider *Taylor v. Whitehead* has settled the distinction, that the right of going on the adjoining land extends not to private as well as

(b) *Bolton v. B. of Carlisle*, 2 H. Bl. 259.

public

public ways. And there may be many reasons in the case of highways, why the public should have an outlet, because it is for the public good that a passage should be afforded to the subjects at all times. But the same necessity does not exist in the case of a private right. Whoever will look to Serjt. *Williams's* note to the case of *Pomfret v. Rycroft* (a), will find both the law upon the subject, and the manner of pleading a way of necessity, very accurately detailed. It is a thing founded in grant, and the grantor of a private way does not grant a liberty to break out of it at random over the whole surface of his close. It is established law, that the grantee of a private way cannot break out of it, and I hope that we shall not be carried to nisi prius upon such an unlimited right as claimed by these pleas. It seems to me that both pleas are ill.

Per Curiam, Judgment for the Plaintiff.

(a) 1 *Saund.* 323. n. 6.

PATTERSON *against* RITCHIE.

Tuesday,
Nov. 21st.

ASSUMPSIT on a policy of assurance on goods valued at 14000*l.*, on board the *Dispatch*, from *Liverpool* to *Quebec*. Loss by capture. Plea non assumpsit. At the trial before Lord *Ellenborough* C. J. at the *London* sittings after last *Michaelmas* term, there was a verdict for the plaintiff, subject to the opinion of the Court on the following case :

An abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was

held not to entitle the assured to recover as for a total loss, where, before action brought, the goods were recaptured and arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he has sustained at the time of action brought.

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On the 4th of *August* 1813 the plaintiff, who had chartered the ship *Dispatch* on a voyage to *Quebec*, shipped on board her at *Liverpool*, the goods insured, consisting of 31 puncheons of rum, 120 tons of salt, and a quantity of coals and mats, of which he was owner, for *Quebec*, to be delivered to certain persons there for the shipper's account. On the 10th of *August* the ship sailed with her cargo, on the voyage insured, and on the 27th of *September* was captured by an *American* privateer; of which capture some of the crew of the *Dispatch* brought intelligence to the plaintiff at *Liverpool* on the 13th of *October*; and on that day the plaintiff communicated the facts of the capture and arrival of the crew to the underwriters, and offered to abandon to them his interest, and demanded payment of a total loss, but the underwriters refused to accept the abandonment or pay. On the 27th of *October* the ship and cargo were recaptured by an *English* privateer, and carried to *Halifax* for adjudication; where 11 puncheons of the rum were sold in order to pay the salvage on the recapture of the goods. Afterwards in *May* 1814 the ship with the remaining goods reached *Quebec* in good condition, where the goods were sold for the account of those concerned, but it was discovered that owing to the capture and recapture 188 gallons of the rum, and 23 tons of the salt, had been plundered and were lost. In the ordinary course the ship and cargo ought to have reached *Quebec* in *October* or *November* 1813, and it was from the causes above stated, and from the freezing of the river *St. Lawrence*, which sets in in *November* and does not leave the river navigable until *April*, that they did not arrive at *Quebec* till the *May* following. The salvage and charges on the goods, amounting to 209*l.*, were paid out of

of the proceeds of the sales at *Halifax* and *Quebec*; the nett proceeds of which after payment of such salvage and charges amounted to 573*l.*, whereas if the goods which were sold at *Quebec* had reached their destination in *October* or *November* instead of the *May* following, when the market was declining, they would have netted 559*l.* more. The defendant paid to the plaintiff, without prejudice, the difference between the valued amount and the produce of the rum sold at *Halifax*, also the value of the rum and salt plundered and lost, and also the 209*l.* paid for salvage and charges on the recapture, which payments covered the plaintiff's loss, if it was a partial loss; otherwise, if the plaintiff was entitled to recover for a total loss. And this was the question for the opinion of the Court.

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Scarlett, for the plaintiff, did not rely on the loss of the market or of the voyage (a), as constituting this a total loss, but he argued that the capture caused a total loss, which vested in the assured a right to abandon, and which right the assured exercised while the loss was yet total; and therefore the subsequent event of the recapture shall not divest the plaintiff's right. For the principle is, that where the assured has, at the time of abandonment, a right to charge the underwriter with a total loss, he does by such abandonment cast the chances of subsequent events upon the underwriter, instead of abiding such chances himself. And the mere *spes recuperandi*, which every abandonment necessarily imports, does not, because it is afterwards realized, defeat the effect of an abandonment once well made. It is true that in *Bainbridge v. Neilson* (a) it was said that

(a) *Anderson v. Wallis*, ante, vol. ii. 240.(b) 10 *East*, 345.

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the time of action brought is the time to see whether there has been a total loss of the subject-matter to the plaintiff; and so it may be, where at the time of abandonment the total loss is not complete; as if the ship be recaptured at the time, and it remains uncertain whether the loss will be total; and consequently where an unconditional right of abandonment and of immediate suit for a total loss, never vested in the assured; which was the case of *Bainbridge v. Neilson*. And even the authority of that case has been doubted in Dom. Proc. in *Brown v. Smith* (b), and *Smith v. Robertson*. (c)

Littledale, contra, after referring to *M'Iver v. Henderson* (d) which was argued last term, and now awaited judgment, was stopped by the Court.

LORD ELLENBOROUGH C. J. The point now made is that at the time of abandonment there was a complete vested right of abandonment, and that this being once vested is not done away by subsequent events. In *M'Iver v. Henderson* there had been at one time a total loss, and circumstances went to shew that this totality had never ceased, for the captain was obliged to deposit a sum of money by way of bail, and never had entire restitution. *Bainbridge v. Neilson* was I believe determined upon the authority of *Godsal v. Boldero*, which underwent much consideration, and was founded upon the doctrine of Lord Mansfield in *Hamilton v. Mendes*; and although Lord Eldon is said to have spoken with dissatisfaction of *Bainbridge v. Neilson* in the House of Lords, I confess, with all deference, I am

(a) 1 Dow. 349.

(b) 2 Dow. 474.

(c) See post.

be a sufficient answer to an action against the sheriff brought before it was put in. Nobody has as yet been hardy enough to imagine that *comperuit ad diem* may be satisfied by putting in bail at any time before the trial. There is a vast number of things so clear that it needs no authority to prove them. Wherefore nobody has hitherto doubted, that if a person is required to appear in one term, his appearance after the term, and after the action for an escape is brought, will not satisfy it.

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BAYLEY J. By putting in bail of the term in which the writ was returnable the action may be defeated, because when bail is allowed generally of the term, you cannot enquire on what day. This is the utmost extent to which the practice has gone.

DAMPIER J. I do not understand that the practice has ever been carried beyond the term in which the writ was returnable; if bail might be put in after the term, it might at any time before trial. But the question is, has the sheriff answered the exigency of the writ, which requires bail to be put in of *Easter* term, by putting it in of *Trinity*?

Per Curiam,

Judgment for the Plaintiff.

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Thursday,
Nov. 23d.BAILEY *against* WARDEN. (In Error.)

In trespass against the adjutant of a regiment of local militia for arresting and imprisoning a serjeant in the same regiment, upon a charge of unsoldier-like conduct in exciting disobedience and mutiny, it is a good defence upon the general issue that the action was not brought within six months after the fact committed; but if the imprisonment is continued by defendant, in pursuance of orders from the commanding officer of the regiment, to a period within six months, the action lies; unless the continuance of it be justifiable on the part of the commanding officer; and such continuance was held

to be justifiable where it was in order to bring plaintiff to a general court-martial for uttering words in the presence of several serjeants and others of the same regiment, amounting to disorderly conduct on the part of plaintiff, to the prejudice of good order and military discipline, within the 24th section of the articles of war, art 2., although the words uttered referred to an order made by the commanding officer, which he was not strictly competent to make, and although plaintiff was acquitted by the sentence of the court-martial.

THIS case was argued in last *Easter* term by *Blosset* Serjt. for the plaintiff in error, and *Storks* for the defendant. For the authorities cited in argument, see 4 *Taunt.* 69. et seq.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This is a writ of error from the Common Pleas in an action of trespass brought by the plaintiff below, *Richard Warden*, a serjeant on permanent pay in the first regiment of *Bedfordshire* local militia, against the defendant below, *Charles Bailey*, adjutant of the same regiment, for the arrest and imprisonment of him under the circumstances stated in the bill of exceptions tendered to Sir *James Mansfield*, then C. J. of C. P. at the trial, and which now comes before this Court with the original record, under the writ of error in this case. The defendant below pleaded the general issue, and upon that issue coming on to be tried at *Bedford*, the following bill of exceptions was tendered to the Chief Justice.

The bill of exceptions states the evidence given for *Warden* to be this: in Nov. 1809 *Warden* was a serjeant on permanent pay, in the first regiment of *Bedfordshire* local militia, of which regiment *Bailey* was adjutant,

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and *Samuel Whitbread*, Esq. was lieutenant-colonel commandant. In that month the lieutenant-colonel made a verbal order, as part of the military duty of the regiment, that certain of the serjeants and corporals, of whom *Warden* was one, should attend an evening school to be kept by the serjeant-major of the regiment, for the purpose of instruction in reading and writing, and should pay a weekly sum for the expences of the school, and for the charges incurred thereby. *Warden* having been absent from the school, was for that cause ordered to appear on parade with other serjeants and corporals of the regiment, before the lieut.-col., on the 1st of *December*, and he accordingly appeared, and was dismissed by the lieut.-col. upon begging pardon for his neglect, and promising to attend the school in future. Other serjeants and corporals present on that occasion, and among others one *John Cooper*, had been ordered to attend, and did attend for the same cause as *Warden*, and *Cooper* was also ordered to attend for disobedience of a military order given to him, and *Warden*, *Cooper*, and the other serjeants and corporals were sent for, one by one, from the parade, and called in before the lieut.-col., and neither *Cooper* nor any of the others heard *Warden* address any words to *Cooper*, or to any of them, to encourage him or them to refuse to attend the school, or to that effect. The parade was dismissed in a quiet and orderly manner, and the adjutant was present on duty during the whole parade. Before *Warden* was dismissed he was ordered to attend a drill parade on the following day, and did attend, and while he was standing on parade, *Bailey* put him under arrest, and gave him in charge to some non-commissioned officers of the regiment, who with drawn swords marched him

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through the streets to the common gaol of the town of *Bedford*, and placed him in the custody of the gaoler, and there imprisoned him in a cell of the gaol from that day to the 4th of *December*, when he was brought before the lieut.-col. and the defendant at the inn, and the lieut.-col. ordered him to be remanded to the gaol, which order was delivered to *Bailey* to see executed, and was executed by him accordingly, and *Warden* was lodged in the gaol as before, until the 24th of *December*. On the 24th he was in the same manner and by the same command taken from the gaol to his own dwelling-house in *Bedford*, and there imprisoned until the 26th of *January* following, when he was in like manner, and by the same command, taken from his dwelling-house to *Stilton* barracks, and was there imprisoned until the 11th of *March*. No charge in writing was given by *Bailey*, or by any person, to the gaoler, or any other person, at the time of the imprisonment in the gaol, and at that time there was a guard-room in *Bedford* belonging to the regiment. This action was commenced on the 27th of *June* following.

The counsel for *Bailey* gave in evidence the articles of war, and also these facts. The town of *Bedford* was the head-quarters of the regiment, which was then disembodied. One of the duties which serjeants have to perform, is to write the daily orders for their companies in the orderly book, and to keep the accounts of such companies. The order for attending school was duly notified to the non-commissioned officers by *Bailey*, who also signified to them that it was intended that the expence of the school, which might be 8*d.* or 6*d.* a-piece per week, should be paid by such non-commissioned officers, but that if the expences of the school could be defrayed

defrayed by a smaller weekly payment, a less sum than 8*d.* a week would be collected. No objection was then made by any of the non-commissioned officers to such order and intention. The school commenced on the 27th of *November* 1809, and was continued until the 8th of *December*. Part of the non-commissioned officers of the regiment attended the school, and others absented themselves. Nothing was ever paid by any of them on account of the school, or deducted from their pay, or demanded of them otherwise than by issuing the above order for establishing the school. When *Cooper* was called off the parade into the house to be spoken to by the lieut.-col., other serjeants and corporals of the regiment who were ordered to attend the parade, but not for non-attendance at the school, or for any other default, heard *Warden* speak these words: "Damn your eyes, Jack, don't give up, don't yield, don't go to school, for I'll be damn'd if I do; I will soldier with any body, but I will not go to school, I will not be made a boy of; I hope we shall be dismissed in time for the post this evening, that my father may write to the war-office; my father will see me righted though it cost 200*l.* A regimental court-martial will not do for me, I will have a general court-martial;" which words the serjeants and corporals who heard them believed to be addressed to *Cooper*, but neither *Cooper* nor any of the other serjeants or corporals, who were ordered there as defaulters, heard the words. Upon hearing these words one *Smith*, a serjeant in the regiment, said to *Warden*, "By God Almighty, such language as that is enough to make the men mutiny," to which *Warden* replied, "He would be damn'd if he cared." In the same evening, long after the parade had been dismissed, some of

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the serjeants and corporals, who had witnessed this language and behaviour of *Warden*, communicated it to the serjeant-major, and the following morning it was reported to *Bailey*, who sent immediately for *Smith*, and *Smith* confirmed it to him. Whereupon *Bailey* ordered *Warden* to attend him, and repeated to him the words imputed to him, and read to him the 3d and 4th articles of the 2d section of the articles of war, on mutiny, and immediately put him under arrest, and caused him to be marched in charge of a serjeant, and a file of corporals, with bayonets fixed, from his (*Bailey's*) house in *Bedford* to the town gaol, and left him in custody there, and forthwith, viz. on the 3d of *December*, made a report thereof to the lieutenant-colonel. The lieutenant-colonel, on the 4th of *December*, attended at the inn to enquire into the subject, and for that purpose ordered *Warden* to be taken from the gaol to the inn, and to be brought before him, and on his being brought, stated to him the nature of the charge against him, which had been reported to him by *Bailey*. *Warden* denied the charge, and the lieutenant-colonel examined three witnesses, viz. *Smith*, another serjeant, and a corporal, who asserted, in the presence of *Warden*, that they had heard him use the aforesaid words, or part of them. The lieutenant-colonel did not examine *Cooper*, or any of the serjeants and corporals who were present on the parade of the 1st of *December* as defaulters, but thereupon ordered *Warden* to be taken from the inn to the goal, and to be there imprisoned in manner aforesaid. This order was delivered by the lieutenant-colonel to *Bailey*, that he might attend to its being duly executed, as adjutant, and it was executed by *Bailey* in conformity to the order. On the

the 5th of *December*, the lieutenant-colonel having previously consulted his officers on the subject, who thought it a fit case for a general court-martial, wrote to the general commanding the district, requesting that the same might be appointed.

(The bill of exceptions then set forth, and His Lordship stated, a correspondence between the lieutenant-colonel and the general commanding the district, commencing on the 5th of *December* and ending on the 2d of *January*, touching the charge against *Warden*, and the bringing him to a general court-martial; the substance of which was, that the lieutenant-colonel being required to transmit to the war-office a specific charge against *Warden*, did, on the 22d of *December*, prefer a charge against him for unsoldier-like and mutinous conduct, and endeavouring to excite *Cooper* to disobedience and mutiny, and speaking and using the words (as above stated) addressed to *Cooper* in the presence and hearing of several non-commissioned officers of the regiment. Upon which the lieutenant-colonel was informed that the commander-in-chief approved of there being a general court-martial for the trial of *Warden*, and that in consequence of the insufficiency of the militia force in the district to compose a general court-martial, *Warden* was to be tried at *Norman Cross* barracks.)

On the 9th of *December* *Warden* made a demand in writing of the cause of his commitment, and on the 10th obtained a copy of it, which was for unsoldier-like conduct in exciting disobedience and mutiny. On the 24th the lieutenant-colonel ordered *Warden* to be removed from the goal to his (*Warden's*) own house, which order was executed, and *Warden* was ordered to remain under

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military arrest at his house, but did not in fact remain constantly within his house, nor was any guard placed over him there, but he was attended by a serjeant, by order of the lieutenant-colonel and *Bailey*, when he went from home, and continued under such arrest until the 26th of *January*. On the 12th of *January* a warrant issued for a general court-martial on *Warden* upon the above charge, in consequence of which, and of an order from the lieutenant-colonel, *Bailey* directed *Warden* to be marched, and he was accordingly marched from his own house to the *Norman Cross* barracks, and delivered into the custody of the officer of the guard there, on the 26th of *January*. A general court-martial was held upon him on the 30th and 31st, when he was acquitted of the charges, but was continued in custody at the barracks until his majesty's confirmation of the sentence could be obtained, and on the 11th of *March* following such confirmation was communicated in due course, and he was discharged.

Such are the facts which are stated at some length of detail in the bill of exceptions; and the questions for our consideration upon this record are to be found in the errors assigned. The first error is assigned in this, that the Judge at the trial declared, and delivered his opinion to the jury, that the several matters mentioned in the bill of exceptions were not, nor was any of them, upon the whole of the case, sufficient to bar the original plaintiff of his action against the defendant below. The second error is, (the error commonly assigned) that the verdict was given for the plaintiff, whereas it ought to have been given for the defendant. The third, that judgment was given for the plaintiff, whereas it ought to have been for the defendant. All the errors assigned
resolve

resolve themselves into this question, whether, upon the whole of the facts stated upon the record, and the bill of exceptions, (removed here by writ of error,) the plaintiff was entitled to recover any verdict at all; for if he was, then the direction of the Judge, the verdict of the jury, and the judgment of the Court below, were all of them right; if the plaintiff was not so entitled, then all of them were erroneous. The question naturally arises, in the first instance, on the legality of the original arrest of *Warden* by *Bailey* on the 2d of *December*; but as the action is by the local militia act, 42 G. 3. c. 90., as well as by the mutiny act, required to be brought within six months after the fact committed, and as the action was not in this case brought until the 27th of *June* following, it becomes material to enquire how long the imprisonment under this original arrest continued, and whether any part of the time during which it continued falls within the period of six months immediately preceding the 27th *June*; for if it did not, the action as to such trespass (supposing it such, and not to be otherwise justifiable,) is at any rate barred by the statute of limitations, which, though not specially pleaded in this case, was open to the defendant below in the way of defence, as special matter, on the general issue. Up to the 4th of *December*, when *Warden* was brought from the gaol to which he had been committed by *Bailey*, to the *Swan Inn*, before the lieutenant-colonel, there can be no doubt that the imprisonment was under the authority of *Bailey*, and was an act for which he was originally and personally responsible. On the 4th of *December* he was remanded by the order of the lieutenant-colonel to the gaol in which he had before been confined under the original arrest, and by

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the order of *Bailey*, and was there left under the gaoler's custody till the 24th *December*, when he was taken, by the command of the lieutenant-colonel, from the gaol to the dwelling-house of him, *Warden*, at *Bedford*, where he was imprisoned till the 26th of *January*, when he was, by the like command of the lieutenant-colonel, taken to *Stilton* barracks, where he was imprisoned till the 11th of *March*, when he was discharged, after an acquittal by a court-martial held upon him on the 30th and 31st of *January*. The continuance in custody of *Warden* after the 31st of *January*, when he was acquitted, was necessary and unavoidable until his majesty's confirmation of the sentence of acquittal could be obtained. Upon these facts, the imprisonment under the mere authority of *Bailey* seems to have ceased on the 4th, or at furthest on the 24th of *December*, that is, above six months before the 27th of *June*, when the action was brought. He is therefore protected against this action by the statutable limitation of time of six months in this case, unless the subsequent imprisonment by the command of the lieutenant-colonel, is one for which *Bailey* is responsible jointly with the lieutenant-colonel, and if that imprisonment be not itself justifiable on the part of the lieutenant-colonel and those concerned with him therein. If it was justifiable in the lieutenant-colonel it certainly was at least equally so, on the part of those who then acted in his aid, and by his immediate command; which brings it to the question, Was lieutenant-colonel *Whitbread* warranted by law in the orders which he gave on the 24th of *December* for the imprisonment of *Warden* at his own house, and in his continuance of him under arrest, in order to trial, till 11th *March* 1810, the time of his

final discharge. The specific charge against *Warden*, as reported to the lieutenant-colonel and verified by the evidence of two serjeants, *Smith* and *Craft*, and of corporal *Robinson*, was, that they had heard *Warden* say to *John Cooper*, another serjeant of the regiment (and who, as well as *Warden* and other serjeants and corporals of the regiment, had been verbally ordered as part of his military duty of the regiment to attend a school to be kept in the evening by the serjeant-major of the regiment for the purpose of instruction in reading and writing, and to pay a weekly sum for the expences of such school, and for the charges incurred thereby,) these words, “Damn your eyes, Jack, don’t give up, don’t yield, don’t go to school, for I’ll be damned if I do; I will soldier with any body, but I will not go to school; I will not be made a boy of; I hope we shall be dismissed in time for the post this evening, that my father may write to the war-office: my father will see me righted, though it cost him two hundred pounds. A regimental court-martial will not do for me; I will have a general court-martial.” And that one *Thomas Smith*, a serjeant in the regiment, then present, thereupon said to *Warden*, “By God Almighty, such language as that, is enough to make the men mutiny:” to which *Warden* replied, “he would be damned if he cared.” And the question is, whether these words addressed as they were publickly in the presence of other serjeants, &c. of the regiment to a serjeant of the regiment, then called in question by his lieutenant-colonel in respect of his default in not obeying the above order of the lieutenant-colonel, afforded a reasonable and probably ground of complaint against *Warden* in respect of the words uttered by him. In the 24th sect.

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of the articles of war, (p. 80.) art. 2. it is provided, that "all crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of to the prejudice of good order and military discipline, (though not specified in the said rules and articles,) are to be taken cognizance of by a general or regimental court-martial, according to the nature and degree of the offence, and to be punished at their discretion. Now can it be asked whether the uttering such words as are abovementioned, upon the occasion, and in the presence of the serjeants and others of the regiment, amounted to disorderly conduct on the part of *Warden*, to the prejudice of good order and military discipline? And if the uttering of such words, of the tendency and probable effect of which as to the exciting of mutiny *Warden* was admonished at the time, but which he with an oath professed himself to disregard, be a species of conduct so clearly disorderly, and operating directly to the prejudice of good order and discipline, can there be a doubt whether it falls within the language and object of the 2d article of the 24th sect. of the articles of war, so as to render the person guilty of such offence cognizable by a general or regimental court-martial? Nor will he be less an object of this tribunal for the purpose of military punishment, because the order of the lieutenant-colonel, to which this language referred, might not be a valid one, and such as he was strictly competent to make; and indeed it has not been argued on the part of the plaintiff in error that the order was a valid one; but there may be disorderly conduct to the prejudice of good order and military discipline, in the manner and terms used and adopted by one soldier in dissuading another soldier not to obey an order not strictly legal.

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If every erroneous order on the part of a commanding officer would not only justify the individual disobedience of it by the soldier, but would even justify him in making inflammatory and reproachful public comments upon it to his fellow-soldiers, equally the objects of such order with himself, is it possible that military order and discipline could be maintained? And can such conduct originate from motives not mischievous and disorderly, in the breast of a person, who declares that he is indifferent whether his conduct has that effect, and that to the extent even of producing actual mutiny? Assuming therefore such conduct on the part of *Warden* to fall clearly within the description of disorderly, "and to the prejudice of good order and military discipline," and to be the subject of trial, and upon conviction of punishment, under the 24th section and 2d article of the articles of war, the only remaining question is, was it lawful for the lieutenant-colonel to arrest the soldier accused of such misconduct, in order to his being forthcoming to answer the matter of such charge. The 22d article of war runs thus: "To the end that offenders may be brought to justice, we hereby direct, that whenever any officer, or soldier, shall commit a crime deserving punishment, he shall by his commanding officer be put in arrest, if an officer, or if a non-commissioned officer, or soldier, be imprisoned, until he shall be either tried by a court-martial, or shall be lawfully discharged by a proper authority." The crime with which *Warden* was charged was, if proved, (according to what has been before said) a crime deserving of punishment within the terms of this article of war, and of course subjected *Warden* as a non-commissioned officer to imprisonment until trial, and the trial was had upon the application of the

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the lieutenant-colonel as soon as a court-martial could be conveniently convened for that purpose. And though it terminated in the acquittal of *Warden*, it does not deprive the parties of the same justification which they would have had in another event of the trial, if there was a reasonable and probable cause for the original imprisonment of the plaintiff *Warden*, until trial could be had, and afterwards till his majesty's confirmation of the sentence could be obtained. We are, therefore, of opinion that the alleged trespasses in this case were at any rate covered by the statutable limitation up to the 24th *December*, and that all the subsequently alleged trespasses committed under the order and in aid of the lieutenant-colonel, were justifiable in respect of that officer, and consequently in respect to the defendant below, as acting under the command, and in aid of that officer.

Judgment for the plaintiff in error.

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CHASE *against* JOYCE.

Service of a latitat directed to the sheriff of *Surrey*, at *Batson's* coffee-house in the city of *London*, is irregular, and the Court will set it aside. *Secus* if there be a doubt as to the confines.

LORD *Ellenborough* C. J. delivered the judgment of the Court.

This case came before the Court at the end of the last term, on a motion made by Mr. *Andrews* to set aside the service of a latitat, and subsequent proceedings, for irregularity, the same being directed to the sheriff of *Surrey*, and having been served on the defendant at *Batson's* coffee-house in the city of *London*. There appearing to have been contrary decisions on the point, the Court having heard Mr. *Marryat* shew cause against the rule, and Mr. *Andrews* in support of it,

it, directed it to stand over in order that the cases might be looked into, and the practice settled for the future. We have looked through the several cases on the subject to which we were referred, viz. *Devenege v. Dalby*, *Doug.* 383. 4th edit., *Borman v. Bellamy*, 1 *T. R.* 187., *Kelly v. Shaw*, 6 *T. R.* 74., *Busby and Another v. Fearon*, 8 *T. R.* 235., *Colwell v. Vestris*, *Easter* 1815 (a), *Bugby v. Balls*, *Trinity* 1815 (b). The two first were cases where a *bill of Middlesex* had been served in another county, and such service was held to be clearly irregular; and the reason given was that the bill of *Middlesex* is in form a different writ from a *latitat*, and cannot run over all *England*, and that to hold the contrary would put an end to the writ of *latitat*. The two next cases were cases where a *latitat* had been served in a different county than the county into which, or to the sheriff of which, it was directed, and in one of them it had been served in *Middlesex*. And the Court in those two cases refused to set the proceedings aside, on the ground that the form of the writ was the same, and that the object being merely to give personal notice to the party, it mattered not in what county it was served. And there certainly have been other decisions to the same effect. The two last cases, and which occurred in *Easter* and *Trinity* terms last, were decided otherwise, and such service of a *latitat* in

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(a) *Easter* term 1815, *Colwell v. Vestris*, sued with *Thompson*. Reader moved to set aside the service of a *latitat* in this case, which was directed to the sheriff of *Surrey*, but served on defendant *Vestris* in the *Haymarket*, *Middlesex*, and who never resided in *Surrey*. Rule nisi granted, and afterwards made absolute. *Espinasse* contra.

(b) *Trinity* term 1815. *Bugby v. Balls*. *Adolphus* moved to set aside an attachment of privilege, directed to the sheriff of *Kent*, which was served on defendant in *Tottenham-Court-Road*, *Middlesex*. Rule nisi granted, afterwards made absolute. *Curwood* contra.

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a different county was held irregular. And, on consideration, we think it safest to adhere to the forms of our proceedings, and to require our process to be served according as it is directed, that is, in the county to the sheriff of which it purports to be sent. With respect to a *bailable latitat*, there never has been a doubt but that it must be executed in the county, and by the officer of the sheriff to whom it is directed; out of the county the officer would be a trespasser. And although in the case of process not bailable, the same may be served without the intervention of the sheriff, yet it *may be* delivered to the sheriff, and he *may be* required to execute it. But it can never be contended that he could be called upon to serve it out of his county, or that he could justify entering the house or coming on the land of the party, out of his county, for the purpose of serving it. And if so, why shall any other person, by taking the execution of the process into his own hands, arrogate to himself a more extensive jurisdiction? The consequence of establishing the practice contended for by the plaintiff in this case would be, that in future no bill of *Middlesex* would ever be sued out, but in all cases a *latitat* would issue to the sheriffs of *London*, or the sheriff of *Surrey*, whether the party to be served lived in *Cornwall* or in *Cumberland*. This is a mode of dealing with established forms which we do not wish to encourage, and which can only be checked, to a certain degree, by retracing our steps. We mean not, by any thing which I have said, to break in upon those cases where the Court has refused to enter into a question of the limits of adjoining counties, in deciding on the regularity of the service of process of this description; but where no such question

question arises, the Court must look to the words of its process. We therefore think, in the present case, that the service was irregular, and that the rule for setting aside the proceedings must be made absolute; but as the irregularity has been sanctioned by authorities, the rule must be made absolute without costs.

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The KING *against* The Bishop of WORCESTER
and Others.

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ROBERT Earl of *Leicester*, by indenture of the 21st of *November*, in the 28th *Eliz.* (1585), and by virtue of stat. 13 *Eliz. c.* 17. (a), founded an hospital at *Warwick* for the sustentation and relief of poor, needy, and impotent people, and especially of such as should be thereafter wounded, maimed, or hurt, in the wars, in the service of her majesty, her heirs and successors, to consist of one master and twelve brethren, to be ap-

Where the founder of an eleemosynary corporation by deed, 28 *Eliz.*, made by virtue of an act of parliament, granted that the same should be for the sustentation of poor, needy, and impotent people, and especially of

such as should be maimed in the wars in the service of her majesty, to consist of a master and twelve brethren, to be appointed by him and his heirs, and that it should be governed by such rules and ordinances as were annexed, or at any time thereafter should be made by him; and afterwards he made certain ordinances, viz. that the people of certain towns and lordships should be preferred to the places aforesaid before any other, according to a certain rotation, and that the Bishop, Dean, and Archdeacon of *Worcester* should be visitors, and should correct, punish, and reform all abuses and offences to be committed by the master and brethren, and see that his ordinance truly executed according to its meaning; and afterwards the heir of the founder, upon a vacancy of one of the brethren, appointed a person to succeed who was a soldier maimed in the wars, and poor and impotent, but not belonging to either of the towns or lordships mentioned in the rotation, against which appointment three persons belonging to the town next in the order of rotation, who were poor and impotent, and some of them wounded in the service, appealed to the visitors, on the ground that the appointee was ineligible, and that there were others beside themselves belonging to the said town, who were eligible: Held that such appeal well lay, and therefore the Court granted a mandamus to the visitors, who had heard the evidence in such appeal, but declined to act therein, to proceed and determine the appeal.

(a, See *Rastall's Statutes*.

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pointed by the said earl and his heirs, and in default of their appointment within three months after any vacancy, by the Bishop of *Worcester*, and the recorders of *Coventry*, and *Warwick*, for the time being, or any two of them, and that the same should be a corporation, and should be ruled and governed, ordered and directed, according to such rules, statutes, and ordinances as were annexed, or at any time thereafter should be set forth, made, devised, and established by the said earl, by writing under his hand and seal. And on the 26th of *November* in the same year the said earl gave, under his hand and seal, divers rules and ordinances, and, among others, that the master should be an ordinary preacher of God's word, and of good life and conversation; and if he should be otherwise, it should be lawful for the visitors, or two of them, to deprive him. Also, that the lame and maimed soldiers and poor people which should happen to be in the towns of *Warwick*, *Kenelworth*, and *Stratford-upon-Avon*, in the county of *Warwick*, or in the lordship of *Wotton-under-Edge*, and *Arlingham*, in the county of *Gloucester*, should be preferred to the places and rooms aforesaid before any other, viz. (in the order as the towns and lordships are above stated) *alternis vicibus*, and for default of such poor or maimed people in the towns aforesaid, then the same poor brethren to be taken and chosen out of any town in the county of *Warwick*. Also that the Bishop, Dean, and Archdeacon of *Worcester* for the time being, or any two of them, after the death of the said earl, should be visitors of the hospital, and that it should be lawful for them, or any two of them, to visit the same at any time at their pleasure, so that it be not above once in three years, and to correct,

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rect, punish, and reform all abuses and offences to be committed or done by the master and brethren, or any of them, and to see that his ordinance truly executed according to the true meaning of the same.

Mr. *Sidney* of *Penshurst*, who is the heir general of Earl *Leicester*, the founder, and as such entitled to appoint the master and brethren, upon the death of one of the brethren appointed *Fellowes* to succeed; *Fellowes* being a soldier maimed in the wars, and poor, needy, and impotent, but born at and belonging to *Birmingham*, and not to either of the towns or places mentioned in the ordinance. Whereupon three persons, all inhabitants of *Kenelworth*, one of whom was sworn to be a decayed tradesman, and to have no means of livelihood but his daily labour, another to be a discharged marine, who had caught the opthalmia, and had been wounded in the service, and had no means of living but his daily labour, and the third to have been in the *Warwick* militia, and also a tailor, and to have no means but his daily labour, appealed to the bishop, dean, and arch-deacon of *Worcester*, as visitors, on the ground that the appointment should have come out of *Kenelworth*, the last appointment having been made out of *Warwick*, and that *Fellowes* was ineligible, and that there were other objects besides themselves, resident and born in *Kenelworth*, who were eligible. Upon the day appointed for hearing the appeal, the appellants went into proof of this their complaint, but the solicitor of Mr. *Sidney* protested against the power of the visitors to proceed; and afterwards the visitors declined to act, on the ground that they could find no instance in which the visitors had exercised the power of removing from the hospital.

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Upon affidavits disclosing these facts, *Topping*, in the last term, obtained a rule nisi for a mandamus to the bishop, dean, and archdeacon, to proceed and determine the said appeal.

Lens Serjt. now appeared for the visitors, and submitted to the direction of the Court; only he suggested for their consideration whether the authority of the visitors extended to control the heir of the founder.

Blosset Serjt. and *Holroyd* for Mr. *Sidney* took several objections to the visitatorial jurisdiction of the defendants in this case. First, for want of proper parties to the appeal. For there is not any instance to be found of persons, like these appellants, being allowed to appeal, merely because they, among others, were eligible to any particular office, or place, and because one of them might perchance have been appointed to it. And if these persons may appeal, and come to this court for a mandamus, every person who stands *in communi jure* with them, may do the like, and there may be as many appeals as there are maimed paupers in *Kenelworth*; or suppose this eligibility had been extended to all the poor of many parishes, or to all soldiers, or to all native-born *English*, appeals might be multiplied *in infinitum*. Next, the appellants do not bring themselves within the description of persons eligible, for in order to that they must be poor, needy, and impotent, which cannot be said of those who are able to maintain themselves by their daily labour. Next, the ordinance contained in the deed 24th *November*, so far as it restrains the eligibility of persons to particular towns and places, is void. For the statute *Eliz.* enabled the founder to erect

erect an hospital, and enacted that it should be governed according to such rules, statutes, and ordinances as should be set forth, made, devised, and established by the said Earl, or by his heirs or assigns, in writing under his or their hand and seal. Accordingly the Earl did by his first deed, 21st Nov., ordain that the objects of the charity were to be poor, needy, and impotent people, especially such as should be maimed, &c., and without any limitation as to place; which power having once exercised, he was *pro tanto functus officio*, and could not new-model or qualify by any subsequent ordinance. And though by the first deed the Earl reserves to himself to make ordinances at any future time, that must be understood only in respect of such things wherein he had not already executed the power; and wherein the statute empowers his heirs as well as himself to make ordinances. But having once executed the power by which he vested in himself and his heirs a right to appoint persons of a certain description without regard to place, it follows that he could not afterwards restrain this right to particular places, no more than his next heir after him could have done, or his present heir could now do. Next, a general visitatorial power, such as this, does not extend to an act done by a person not a member of the corporation, particularly by one who is the heir of and represents the founder; and who is not within the scope of this visitatorial authority either in respect of citation, or of contumacy in disobeying it. For to be visitor imports a power of punishing for contumacy by deprivation, and therefore it seems essential that the person visited should be a member of the body corporate. And it is plain that by the general words, “that it shall be lawful for them to visit and to correct

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and reform abuses," &c., the founder did not mean that they should have a general authority to deprive, for otherwise why give them a particular authority to do so in the case of the master? He therefore meant only that they should correct abuses in the internal regulation, such as are properly termed offences, &c.

LORD ELLENBOROUGH C. J. The only question before the Court is, whether visitor or not *quoad* the subject matter. *Sit visitator* is sufficient for the appointment of a general visitor, and gives a consummate jurisdiction for all purposes incidentally necessary for this power. If a person be thus constituted visitor in general terms, whatever comes in derogation of his power must be expressed, otherwise he is *pleno jure*. As to the objection that these persons are not poor enough, surely if they can only maintain themselves by their daily bodily labour, they are poor within the meaning of this deed; the deed does not require the very extreme of neediness. With respect to another objection; there is a reservation in the original deed for statutes and ordinances thereafter to be made, and when they were made, they became incorporated into the original foundation.

BAYLEY J. The point for the visitors to determine is, whether one of the members of the corporate body has improperly intruded. The appellants may be interested, even without regarding their own appointment, in seeing that a poor person of *Kenelworth* is appointed, and thereby removed from thence and maintained by the hospital.

DAMPIER J. A general visitatorial power requires particular words to abridge it.

Per Curiam,

Rule absolute. (a)

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Topping and *Richardson* were in support of the rule.

(a) See *Philips v. Bury*, 2 T. R. 349. As visitor, it is incidental to deprive as well as to correct offences.

The KING *against* The Justices of DEVON.

Thursday,
Nov. 23d.

GIFFORD moved for a rule nisi for a mandamus to the justices to enter continuances at their next quarter sessions, upon an appeal against an order for the relief of a pauper, which appeal the justices had dismissed at the last sessions, conceiving that they had not any jurisdiction in the matter. He referred to *Burn's Just.* (a) for the author's opinion that, notwithstanding the determination in *Rex v. North Shields* (b), an appeal lies against an order for relief; for *Burn* says that the great fundamental statute of 43 Eliz. c. 2. s. 6. gives an appeal for any thing done by the justices in relation to the relief of the poor; which, by the rule that acts *in pari materiâ* are to be taken together and considered as one entire act, may seem to include this case concerning the order of maintenance. He also speaks of such appeals as of a practice than which nothing was more common at the sessions; and *Rex v. Woodsterton* (c) is one instance of it. The reason as-

An appeal does not lie to the quarter sessions against an order for relief.

(a) Vol. iv. 117. 21st edit.

(b) *Doug.* 331.

(c) *Barnardist.* 207—247.

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signed in *Rex v. North Shields* for not giving the appeal, lest while the matter is in suspense the poor should starve, does not hold, because the order continues in force until altered by legal authority. And the 43 *Elix.* does not seem to have been adverted to in that case. Here, if there be no appeal there is no remedy; for the objection to the order is, that it is to a wrong parish; yet if the overseers acting upon this were indicted for disobeying the order, the Court would not, upon such a proceeding, try a question of boundary.

Per Curiam. If in every case of an order for relief an appeal will lie, this will divert the funds designed for the relief of the poor into other channels. This order is not *in perpetuum*, it is to pay *until farther order*, and why cannot the overseers go back to the quarter where it was made, and point out that the pauper's residence is in another parish, and obtain a fresh order?

Rule refused.

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PAYLER and Others *against* HOMERSHAM.Friday,
Nov. 24th.

DEBT on bond, dated 28th of *June* 1811, for 1500*l*.

The defendant pleads a release of the 7th of *November* 1812. Replication prays oyer of the release, which recites that the defendant, on the day of the date thereof, stood indebted to his creditors in divers sums of money, as set against their respective names thereunder written, and was unable to make full or present satisfaction thereof, and that the creditors had agreed with him to take 15*s*. in the pound upon the whole of their respective debts, and thereupon the creditors, in consideration of 15*s*. in the pound upon the whole of their respective debts, paid to them by the defendant before the execution of the release, each and every of them did release the defendant from all manner of actions, causes of action, suits, debts, claims, and demands in law and equity which they or any or either of them had against him, or thereafter could, should, or might have by reason of any thing from the beginning of the world to the date of the release. And against the plaintiffs' names, among the rest of the creditors, was set the sum of 214*3* *l*. 1*s*. 9*d*., as the amount

A release contained in a deed, which recited that defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of defendant 15*s*. in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15*s*. in the pound paid to them before executing the release, each and every of them did release defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either had against him, or thereafter could, should, or might

have, by reason of any thing from the beginning of the world to the date of release, was held to release nothing but the respective debts, and all actions and demands touching them; for the general words of release have reference to the particular recital, and shall be governed by it.

Therefore where to debt brought by plaintiffs on defendant's bond, the defendant pleaded this release, held that plaintiffs, in their replication, might plead that the bond was given by the defendant with others as a security for the repayment of bills drawn upon them by the defendant, and for monies advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the monies intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part included or meant by them or by defendant to be included in the sum set against their names or in the release.

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of their demand. The replication also prays oyer of the bond and condition, which was a joint and several bond given by the defendant and others to the plaintiffs, with a condition reciting that the plaintiffs had agreed, in the way of their business as bankers, to accept and pay the drafts of one *Hamett*, not exceeding 1500*l.*, nor drawn for any longer time than three months, and that the obligors had agreed to execute the bond as a security for the repayment of such money; and the condition was to repay to the plaintiffs the amount of all such notes and bills as *Hamett* should make payable by them, and to pay to them such further sums as they should advance to *Hamett*, or on his account, or for which he should stand indebted to them, and to indemnify them from all sums of money which they should advance to *Hamett*, and against all costs on account thereof. And the plaintiffs plead that the 2148*l.* 1*s.* 9*d.* set against their names subscribed to the release, was the sum in which the defendant, on the day of the date of the release, was indebted to them upon his own account, and that the monies secured or intended to be secured by the bond, although a great part thereof was due and payable to them at the time of the execution of the release, were not nor was any part thereof included or meant by them or by the defendant to be included in the sum of 2148*l.* 1*s.* 9*d.*, or in the release, nor was the sum of 15*s.* in the pound, or any other composition or sum ever paid, or agreed to be paid to the plaintiffs, or to be accepted by them, for or in respect of any monies secured, or intended to be secured by the bond. And the plaintiffs went on to suggest breaches on the bond, viz. the refusal of the obligors to repay *Hamett's* drafts made payable by them,

them, and also to pay them the monies advanced to *Hamett*.

Demurrer and joinder.

And the question was, whether the release was a bar to this action.

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Barnewall, in support of the demurrer, insisted that it was, for that the general words of the release ought not to be restrained, by the particular recital, to the 2148*l.* 1*s.* 9*d.*; for they are large enough to embrace as well future as present demands, and there is nothing inconsistent in a creditor's accepting a composition in lieu of all demands whatever. And the rule for the construction of all instruments is this, that they shall be construed so as to give effect to every part, which cannot be done in this case without extending the words of the release to future demands; for otherwise what becomes of the words, "which they thereafter could, should, or might have," and which demand the plaintiffs consent to release. There is indeed another rule laid down in *Bac. Abr.* (a) which may seem to bear against this construction, viz. that where there is a particular recital in a deed, and then general words follow, the general words shall be qualified by the particular recital; but the case of *Rotheram v. Crawley* (b), which is cited immediately after that position, shews that it is not universally so, and that the force of a word of general meaning is not to be controlled by the intention of the party; as if there be a release of all reliefs, *duties*, and amercements, this shall bar an action of debt upon an obligation, for the word *duty* works an extinguishment of the bond at

(a) *Release*, K.

(b) *Cre. Eliz.* 370. *Owen*, 71. S. C.

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law. And in *Knight v. Cole* (a), where it was held that the general words released only the particular thing acknowledged to be received, and not the action then at bar, that was because the action was in a different right from the thing released, and there must be special words to release what he hath as executor; and accordingly Lord *Holt* declared, if it had not been in the case of an executor, the release would have operated as a bar. (b) And he denied the case in 2 *Roll. Ab.* 409., cited by *Tanfield* to be law (c); and *Gregory J.* seems to have been the only Judge who adopted it as an unqualified proposition, that the general words shall be restrained by the particular. *Thorpe v. Thorpe* (d) was more a question touching what words shall make a condition precedent, than whether general words shall amount to a general release; and in *Trevil v. Ingram*, though it is stated in 2 *Mod.* 281. that judgment was given for the plaintiff, yet it appears by the report of the same case in 1 *Ventr.* (e), and also in 2 *Lev.* (f), that not any judgment was given.

Lord ELLENBOROUGH C. J. I do not find that Lord *Holt*, when he denied the authority of the case from *Roll's Abr.*, denied also the position of *Gregory J.* that the general words of a release may be restrained by the particular recital. Common sense requires that it should be so, and in order to construe any instrument truly you must have regard to all its parts, and most especially to the particular words of it. I am sorry

(a) 1 *Show.* 150. 3 *Lev.* 273. 3 *Mod.* 277. (b) 1 *Show.* 154.

(c) 1 *Show.* 155. (d) *Salk.* 171. 1 *Ld. Ray.* 235.

(e) 314., by the name of *Tolbil v. Ingram*.

(f) 210., by the name of *Ingram v. Bray*.

there-

therefore to find that the case cited from Lord *Rolle* was said not to be law, because it seems to me to be as sound a case as can be stated. The argument for the defendant is, that this not only releases him from the obligation, but his sureties also; but the replication avers that the monies secured by the bond were not included, or intended to be included in the release; which averment, if it is competent to the plaintiffs in law to make, puts an end to the question. And surely the release being of an aggregate sum, which is compounded of several debts, the plaintiffs may aver of what it is or is not compounded.

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BAYLEY J. There is no doubt but a particular recital in a deed will restrain the general words.

Per Curiam, Judgment for the Plaintiffs.

Marryat was to have argued for the plaintiffs.

The KING *against* The Sheriff of MIDDLESEX,
 in a Cause of *POUCHEE v. LIEVEN.*

Monday,
Nov. 27th.

THE *capias* was returnable on the first return of this term, and on the 7th of *November* the sheriff was ruled to return the writ, and on the 11th returned *cepi corpus*, upon which the plaintiff on the same day served him with a rule to bring in the body; and on the 17th, bail not having justified, obtained an attachment. The time for putting in bail expired on the 10th. And upon a rule nisi for setting aside the attachment for irregularity, on the ground that the rule to bring in the body should

The sheriff may be ruled to bring in the body on the same day that he returns *cepi corpus*, if the time for putting in bail has expired.

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should not have been served the same day that the sheriff returned *cepi corpus*, because the sheriff had the whole of the day to return the writ,

Campbell, who shewed cause, insisted that as the time for putting in bail had expired, this practice was regular.

Comyn, in support of the rule, cited *Rex v. Sheriff of London* (a), where he said the Court had determined it to be irregular, for the sake of congruity upon the face of the proceedings. He also referred to *Hutchins v. Hird* (b), and said that the cases cited in *Tidd's Prac.* (c) in favour of this practice were only MSS.

Per Curiam. (d) It is now the settled practice, that in all cases where the time for putting in bail has expired, the plaintiff may rule the sheriff to bring in the body on the same day that he returns *cepi corpus*. The difference betwixt this case and *Rex v Sheriff of London* is, that there the time for putting in bail had not expired.

Rule discharged.

(a) 2 *East*, 241.

(c) 301. 6th edit.

(b) 5 *T. R.* 479.

(d) *Dampier J.* was absent.

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BATES *against* WINSTANLEY and Another.Tuesday,
Nov. 28th.

TRESPASS against the defendants, justices of the peace for the county of *Leicester*, for causing the plaintiff's goods to be distrained for payment of a county rate imposed by the magistrates of the county upon certain lands called the *South Fields* in the parish of *St. Mary* in *Leicester*. Plea not guilty. At the trial there was a verdict for the plaintiff by consent, subject to the opinion of the Court upon the following case.

Leicester is an ancient borough and body corporate, and in the 4th *Edw. 4.* the king, by letters patent, granted to the borough (inter alia) That the mayor and four of the more discreet burgesses, together with the recorder, should be justices of the peace within the said borough, and the precincts and limits of the same, to hear and determine felonies, trespasses, and other misdemeanors, with a clause of non intromittant as to the justices of the county. In the 20th *Hen. 7.* the king, reciting

A charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, does not exclude the county justices from rating the district to a county rate; therefore, where, by charters *Edw. 4.* and *H. 7.* to the borough of *Leicester*, the borough justices have exclusive jurisdiction within the borough, with a non intromittant as to the county justices; and by another charter, *Eliz.*, all houses, &c. within the parish of *St. Mary*,

in *Leicester*, are put under the government and jurisdiction of the borough justices, saving to all persons their rights and jurisdictions: Held that the justices for the county of *Leicester* might well impose a county rate upon a part of the parish of *St. Mary*, which lies within the county, and not within the borough, although a rate in the nature of a county rate had been previously imposed for the same time by the borough justices; and although it appeared that in one instance only, in 1684, this part of the parish had contributed to the rate for the county at large, and that from 1768 to the present time rates in the nature of county rates had been assessed upon the parish at large by the borough justices; for before the charter *Eliz.* this part of the parish could not have been contributory to the borough rates, and must have been by law contributing to the county rates, and the charter did not vary the place to which it should contribute from the county to the borough; and though there was no poor rate, or petty constable, or other peace officer for this part of the parish, out of which the rate might be levied by stat. 12 G. 2. c. 29., yet the statute does not on that account transfer the right from the county to the borough justices, and the 44 G. 3. c. 34. s. 9. (local act) supplies any defect which there might be in 12 G. 2. c. 29. to warrant the levy.

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by inspeximus the above charter, granted exclusive jurisdiction to the borough magistrates over the suburbs, in the same manner with a non intromittant clause. In the 41st *Eliz.* the queen granted a new charter to the borough, and extended the jurisdiction of the borough magistrates, and amongst other things granted, that the mayor, recorder, and four last aldermen who served the office of mayor, should be justices of the peace in the borough, and the liberty and precincts of the same, and should have power to hold sessions, &c. “ *Et ulterius pro meliori regimine et gubernatione predicti burgi, ac omnium et singulorum burgensium, inhabitantium, commorantium, et residentium infra eundem burgum, volumus et concedimus quod omnia et singula domus, edificia, messuagia, terras, tenementa, et hereditamenta quaecunque situata, jacentia, vel existentia tam infra parochiam Sanctæ Margaretæ, &c. quam infra parochias Sanctæ Mariæ, Sancti Leonardi, &c. in eodem burgo, per quodcunque aliud nomen, vel alia nomina, vocantur sive nominantur, necnon omnes burgenses, inhabitantes, commorantes, et residentes, in eisdem parochiis, et locis, sive in eorum aliqua, pro tempore, et de tempore in tempus existentes, de cetero in perpetuum sint, erunt, et reputabuntur fore, sub regimine, potestate, gubernatione, jurisdictione, correctione, et coercione majoris, ballivorum, et burgensium burgi prædicti, et successorum suorum, et quod major, ballivi, et burgenses burgi predicti, et successores sui, deinceps in perpetuum habeant, gaudeant, et utantur, omnibus et singulis eisdem consimilibus juribus, libertatibus, preeminentiis, et jurisdictionibus, in omnibus et singulis eisdem parochiis Sanctæ Margaretæ, Sanctæ Mariæ, &c. qualia et quæ, ac in tam amplis modo et forma, præ iisdem major, ballivi, et burgenses, virtute harum litterarum nostrarum patentium, aut aliorum progenitorum nostro-*

rum, habere, uti, et gaudere possint, aut debent, in predicto burgo, aut in aliquo membro, parte, vel parcella, ejusdem burgi. Ita tamen quod hæc præsens concessio nostra non sit ad prejudicium nostrorum hæredum, aut successorum nostrorum, salvo etiam omnibus et singulis corporibus corporatis et politicis, ac aliis personis quibuscunque, ac aliæ personæ cuicunque, omnibus juribus, libertatibus, preeminentiis, et jurisdictionibus quibuscunque aliis quam predictis majori, ballivis, et burgensibus (ut prefatum) concessis, quæ ipsi, aut eorum aliquis, jure et legitime habuerint et gavisi fuerint ad confectionem, et tempore confectionis, harum literarum nostrarum patentium, in tam amplo modo et forma, prout si hæ nostræ literæ patentes nunquam habitæ vel factæ fuissent.

The queen also confirmed to the mayor, &c. all and singular maneria, &c. libertates, liberas consuetudines, privilegia, franchises, immunitates, exemptiones, et jurisdictiones whatsoever, which the corporation theretofore had, or ought to have enjoyed, within the borough, and the suburbs, limits, and precincts of the same, by reason of any former charters or prescription. These charters were accepted, and have been acted upon, and are still in force.

The *South Fields* are a part of the county of *Leicester*, and not within the borough, but are within the parish of *St. Mary*, in *Leicester*, and have always been assessed to the poor rates of that parish by the overseers appointed by the justices for the borough, who have exclusive jurisdiction over the entire parish of *St. Mary*, except the *South Fields*, and *Bromkinsthorpe*, and over the *South Fields*, and *Bromkinsthorpe*, have a concurrent jurisdiction with the county justices. The land-tax, and other parliamentary taxes, payable in respect of the *South Fields*, have always been assessed by commissioners for the county, and the entire proceedings in respect of

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such taxes have always been with the commissioners of the county exclusively. There was no house upon the *South Fields*, nor any inhabitant resident there, until the year 1804, nor has any constable or other parochial officer ever been appointed distinctly for the *South Fields*. Rates in the nature of county rates have been assessed by the magistrates of the borough at their general quarter sessions upon the parish of *St. Mary* from the year 1768 (when rates in the nature of county rates were first imposed in the borough) until the present time, and have been paid out of the poor's rates collected for the parish of *St. Mary* generally, to which poor's rate the *South Fields* have contributed. No rates in the nature of county rates have ever been paid to the county in respect of the *South Fields*, with this exception, that in 1684 the judges of assize imposed two several fines of 1000 marks, and 2000 marks, upon the inhabitants of the county, because there was no gaol, and such fines were apportioned and levied upon the several parishes and places in the county, and, among the rest, 1*l.* 2*s.* was assessed upon the *South Fields*, and a special receiver of these fines was appointed by commissioners under letters patent of *Jac.* 2., which receiver duly accounted for the whole amount of them, and by order of the quarter sessions for the county paid the balance to the county treasurer. The case also stated the passing of 44 G. 3. c. 34. (local act), a copy of which was annexed, and that the justices of the peace for the county, at their general quarter sessions holden after *Easter* 1811, made one general rate, as and for a county rate, whereby they assessed every parish, township, liberty, and place, within the county, and, among others, the *South Fields*, and that the *South Fields*

Fields had before been rated by a rate made by the borough justices, in the nature of a county rate, for the same period of time for which the rate so assessed by the county justices was made (a). The plaintiff was one of the overseers of the poor of *St. Mary's*, and an occupier of land in the *South Fields*, and this distress was made upon him by virtue of a warrant granted by the defendants to levy the said county rate. If the Court are of opinion that the plaintiff is entitled, a verdict to be entered for 1s. damages, otherwise a nonsuit.

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The question made upon this case was, whether the rate imposed by the county justices upon the *South Fields*, was lawfully imposed by them; which was argued by *Denman* for the plaintiff against the rate, and by *Reader* for the defendants in support of it. The argument for the plaintiff was in substance this:— The power of the county justices is not extended by 12 G. 2. c. 29. (general county-rate act) to such a district as this; for the act (s. 1.) directs the rate to be assessed upon every town, parish, or place; and (s. 2.) that it shall be paid out of the poor's rate; or (s. 3.) if there be no poor's rate, shall be levied by the petty constable or other peace officer belonging to the same; so that the *South Fields* must be either a town, or parish, or a place having a poor's rate, or having a petty constable or other peace officer, in order to give the county justices jurisdiction. It is admitted that it is not a town or parish, nor a place having a petty constable or other officer; and that it has no poor's rate out of which this

(a) It was agreed, upon the argument, that this fact should be inserted.

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rate may be levied, is plain from considering that the poor's rate is for the parish of *St. Mary's* at large, and not for the *South Fields*, and that the parish at large is not contributory to the county rate, but is, under the charter of *Eliz.* and by virtue of this act, explained by the 13 G. 2. c. 18. s. 7. to be assessed by the borough justices to a separate rate, in the nature of a county rate. And the jurisdiction of the county justices is not aided by the 44 G. 3. c. 34 (local act), because there is a saving in that act (s. 14.) of the jurisdiction of the borough justices as it stood before. 2dly, Granting that the county justices have a concurrent jurisdiction with the borough justices to rate the *South Fields*, yet the borough justices having already exercised it by imposing a rate for the very same period for which this rate is now imposed, the power of the county justices is for this time gone, according to the principle established in *Rex v. Sainsbury.* (a)

For the defendants it was answered, that if the borough justices had no jurisdiction to impose a rate, in the nature of a county rate, on the *South Fields*, the argument founded upon the priority of their exercise of it, was at an end. That the borough justices neither before nor since the 12 G. 2. c. 29. had any jurisdiction to impose this rate upon the *South Fields*. For the charter of *Eliz.* only gave them a concurrent jurisdiction in the commission of the peace with the county justices, but not to rate lands within the county which were not before rateable by them, but on the contrary were rateable by the county justices for several of the purposes now included in the county

(a) 4 T. R. 451.

rate ;

rate; as for repairing of bridges, by 22 *H. 8. c. 5.*, and for relief of prisoners in the county gaol, by 14 *Elia. c. 5.* Neither did the 12 *G. 2. c. 29.* enlarge their jurisdiction over these lands; for its intention was only to facilitate the assessing, collecting, and levying of county rates, and with this view to give power to the justices to consolidate under one assessment the several purposes for which before then several assessments used to be made; and it appears by 13 *G. 2. c. 18.* that the same power was intended to be given to the justices of liberties, &c. within the limits of their commission; but these lands never were within the limits of the commission of the borough justices to assess them for any of the purposes mentioned in the first act. This being so, it follows that they must be liable to be assessed by the county justices; and whatever difficulties might have existed in collecting or levying the rate under the 12 *G. 2.* are now removed by 44 *G. 3. c. 34.* (local act) s. 9.

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Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was an action of trespass against two justices of the county of *Leicester*, for distraining for a county rate, imposed by the county magistrates, upon certain lands in the parish of *St. Mary* in *Leicester*, called the *South Fields*, and the question was whether the county magistrates could impose the rate upon those lands. It was admitted in the argument, though not stated in the case, that the magistrates for the borough of *Leicester* had previously imposed a rate

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upon these lands in the nature of a county rate, for the same period of time for which the rate was levied by the county justices; so that the question is narrowed to this point, whether the county justices can impose the rate, after a previous rate imposed and levied by the borough. The *South Fields* are within the county of *Leicester*, but not within the borough; and the borough justices have a concurrent jurisdiction there with the county justices, but not an exclusive jurisdiction. By charters 4 *Ed. 4.* and 20 *H. 7.* the borough justices have an exclusive jurisdiction, with a non-intromittant as to the county justices, within the borough of *Leicester*, its precincts, limits, and suburbs, and by charter 41 *Eliz.* all houses, &c. within certain parishes including that of *St. Mary* are put under the rule, government, jurisdiction, &c. of the mayor, bailiffs, and burgesses, of the borough of *Leicester*, with a saving to all persons whatsoever of their rights, liberties, preeminences, and jurisdictions. The *South Fields* are within the parish of *St. Mary* in *Leicester*, and have always been assessed to the poor's rate of that parish, by the overseers appointed by the borough justices, and no parochial officer has ever been appointed distinctly for those fields. The only instance in which those fields ever contributed to the rate for the county at large, before the rate in question was imposed, was in 1684, when upon a fine on the county for want of a proper gaol, 1*l.* 2*s.* was assessed specifically upon these fields. There was no house upon the *South Fields* till 1804, and there were no rates upon the rest of the parish of *St. Mary* in the nature of county rates till 1768. From that time such
 rates

rates have been assessed upon the parish by the borough magistrates. County rates are in general assessed in counties under the provisions of 12 G. 2. c. 29., and there is a special act in the present reign, 44 G. 3. c. 34., which contains some provisions for the county in question, the county of *Leicester*. The object of 12 G. 2. c. 29., was, not to impose new rates, but to facilitate the assessing, collecting, and levying those that were previously imposed; and for that purpose, instead of separate rates for the several purposes for which rates under former acts were imposed, there was to be one general rate to answer all the ends and purposes of former acts. There is no intention (in the act) to vary the obligation to pay, or the right to receive; the persons before liable to pay, were still to be liable to pay, and the persons entitled to receive, were still to be the persons so entitled. No part of the act implies a contrary intent. Two of the rates included in this consolidation, viz. the bridge-rate, and the rate for poor prisoners in gaols, were imposed by statutes of an earlier date than the charter which gave the borough justices a concurrent jurisdiction in the *South Fields*, viz. the former by 22 H. 8. c. 5. and the latter by 14 Eliz. c. 5. s. 37. The first of these statutes, that of H. 8., authorizes the taxation of every inhabitant; but 2 Inst. 702. is an express authority that the occupation of lands, without residence, is sufficient within this clause to make a man an inhabitant and liable as such. So that there can be no question but that before the charter of 14 Eliz. the occupiers of lands in these *South Fields* were liable to taxation in respect of county bridges. The stat. 14 Eliz. imposes the tax

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for poor prisoners upon every parish; and the statute for county gaols, 11 & 12 *W. 3. c. 19. s. 1.* upon the several hundreds, lathes, wapentakes, rapes, wards, or other divisions of the county, with an exception as to persons inhabiting in any liberty, city, town, or borough corporate having common gaols for felons, and commission of assize or gaol delivery of such felons; and 12 *Ann. stat. 2. c. 23.* (which is recited in 12 *G. 2.*) directs that the money to be raised under that act, shall be raised by such ways and means as money for county gaols or bridges. The money for county gaols therefore is assumed to be the subject of levy in the same manner as the money for bridges is, and which by stat. *H. 8.* is by taxation made upon every inhabitant within the county, and by construction upon occupiers of land, though not resident, as inhabitants. Before the charter of *Eliz.* therefore, these *South Fields* were liable in the hands of their occupiers to contribute in respect of bridges. There is nothing in this charter to vary their liability, nor is there any thing in this charter to exempt them from liability to the county in respect of those rates which were imposed between the charter and the 12th of *Geo. 2.* The charter does nothing more than entitle the borough justices to act as justices in a place in which before they could not have acted, but it does not make that place less a part of the county, nor does it contain a word which implies that that place is not still to be contributory to the county to the same extent as before, and it would be inconsistent with the saving in that charter of the rights of all persons whatsoever to hold that it entitled the borough to take away from the county its claim upon this

this place for contribution. The 12th Geo. 2. does not in express terms give any power to borough magistrates, and if it gave them any power by implication, it could only be to levy where they could before levy, and for sums to which they were before entitled. But the statute of the succeeding year 13 G. 2. c. 18. s. 7. throws great light upon this point. It recites that doubts had arisen whether 12 G. 2. extended to liberties and franchises not within the jurisdiction of the commissions of the peace for the counties in which such liberties and franchises were, and so never did nor were liable to contribute to the said county rates, and then it provides that where any liberties or franchises have commissions of the peace within themselves, and are not subject to the jurisdiction of the commissions of the peace for the counties in which they lie, and do not, nor did before 12 G. 2. contribute to the rates made for the said counties, the justices of the peace of such liberties and franchises within the respective limits of their commissions, may exercise the powers given by 12 G. 2. In such liberties and franchises therefore (in which a contribution to rates made for the counties existed before the 12 G. 2., and which liberties and franchises have only a concurrent, not an exclusive jurisdiction,) the justices of such liberties and franchises have no power under this latter act, inasmuch as these do not fall within the circumstances to which alone the proviso in the act is declared to extend. And where the jurisdiction is within certain limits exclusive, and in others concurrent only, the power of the justices of those liberties and franchises must be confined to those parts in which the jurisdiction is exclusive. The mis-

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chief of giving them the power where they had a concurrent jurisdiction only might in many cases be excessive; for if they had a concurrent jurisdiction over the whole county, they might, if the Plaintiff's argument were right in this case, anticipate and appropriate to themselves the whole county rate. The Plaintiff's argument is founded upon the supposition that the rate in respect of the *South Fields* must either be paid out of the poor's rate for the parish at large, which would be unjust, or that there was no mode of raising it under 12 G. 2., and that if it could not be raised for the county at large under 12 G. 2. it is not liable to be so raised under the 44th of G. 3. c. 34. We accede to the observation that it would be unjust to have the payment made out of the poor's rate, because that would be casting the burthen, not solely upon the *South Fields*, but upon that part of the parish which is within the borough and subject to the exclusive jurisdiction of the borough justices; and supposing it may be true that no rate could have been raised upon these *South Fields* under the provisions of 12 G. 2., because there is no petty constable, or other peace officer belonging to these *South Fields*, and the only mode of raising the rate, (where it is not to be paid out of the poor rates) pointed out by 12 G. 2., is under s. 3., by direction from the sessions to the petty constable, or other peace officer belonging to the place for which the rate is to be levied, which we are not satisfied is the case, inasmuch as the high constable might levy it; it does not follow, however, from this defect in 12 G. 2., if it be a defect, that the right is to be transferred from the county to the borough. There was no intention in

12 G. 2.

12 G.2. to divest the county of any part of the rates which were before payable to it, and this supposed defect is not confined to these *South Fields*, but extends to every place within the county which had no poor rate, petty constable, or other peace officer, and this defect is completely remedied by the local act 44 G.3. c.34. That act sect. 9. expressly provides for assessing all estates, within all and every the parishes, townships, liberties, precincts, hamlets, extra-parochial and other places within the county; it directs the sessions to tax every parish, township, liberty, precinct, hamlet, extra-parochial place and other places within the county, according to the annual rent and value of the estates within the same, as they shall appear upon the returns under the property tax. It enacts that in any parish, &c. where there is no poor rate, the sessions may direct the sum to be rated and levied on the inhabitant or inhabitants, or occupier or occupiers of lands therein, (using terms in the singular number to include places in which there may not be more than one individual inhabitant or occupier,) and the chief constable is authorised, in case of non-payment, to levy the same by distress and sale of the goods and chattels of such inhabitant or inhabitants, occupier or occupiers; and it makes a similar provision (sect. 10.) though there is a poor rate, if it does not apply separately and distinctly to the place which is to pay the county rate. The proviso in this act that it shall not give jurisdiction to the county justices over any places within the borough, which before that act were subject to the rates in the nature of county rates imposed by the borough justices, falls in with the defendants' argument that these *South Fields* are to contribute

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tribute to the county, because they are not within the borough, and because they were never by law subject to the borough rates. In as much therefore as before the charter of *Elizabeth* these *South Fields* could not have been contributory to the borough rates, and must have been by law contributory to the rates for the county; as that charter, if it could have varied the place to which they should contribute, from the county to the borough, does not appear to have had any such intention; as the 12th *Geo. 2.* could have had no such intention, and as the 44th *Geo. 3.* supplies any defect there might have been in 12 *Geo. 2.* to warrant the levy; we are of opinion that these *South Fields* were by law contributory, not to the borough, but to the county rate, and that the levy in question was therefore warranted by law, and consequently that there must be judgment of

Nonsuit.

Tuesday,
Nov. 28th.

The KING against THOMAS.

Certiorari granted at the instance of the Attorney-General on behalf of a prisoner to remove an indictment for murder, found against him at the sessions for the city of *Rochester*; also a habeas corpus to bring the prisoner into this court.

THOMAS, who was a marine on board one of his Majesty's ships of war lying in the *Medway*, was indicted at the sessions for the city of *Rochester* in October last for the murder of *T. Moore* on the said river, at *Chatham*, within the liberty and jurisdiction of the said city, and pleaded not guilty, and his trial was postponed on account of the absence of several material witnesses on his behalf.

On a former day in this term, *The Attorney General* moved for, and obtained a rule nisi for a certiorari, to be

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e directed to the justices of oyer and terminer, and gaol delivery, &c. of the said city, to remove the said indictment, &c. and also the coroner's inquisition, into this court, and also for a habeas corpus to remove the prisoner, (he being in custody in the gaol of the city.) And in support of this application he produced an affidavit from the prisoner disclosing circumstances whence the Court might be induced to think that he would not have an impartial trial at the sessions. He also said that application had been made to the Court below to order this indictment and inquisition to be filed with the officer of the county of *Kent*, as the next adjoining county, and to remove the prisoner to the gaol of the county, in order that he might be tried by a jury of the county, pursuant to 38 G. 3. c. 52. s. 3., but a doubt had arisen with the justices, whether, their jurisdiction not being a *county* jurisdiction, (there being no county of the city, nor any sheriff,) they had power by the act so to do. And as to the present application, he observed that by stat. 14 H. 6. c. 1. justices of *nisi prius* have power in all cases of felony and treason to give judgment of acquittal or attainder at the day and place where the inquisitions are taken, and there to award execution to be made by force of the same judgments; so that the stat. 25 G. 2. c. 37. which requires sentence to be pronounced in open court, immediately after the conviction of any person who shall be found guilty of murder, does not impose any difficulty, because this record, when removed hither, may either be tried at bar, or if sent to the assizes to be tried before the justices of *nisi prius*, they may give sentence *instantly*, and award execution. He admitted, however, that he had not
found

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found any instance, where a person had been tried and convicted of murder at *nisi prius*, though there were cases of felony. (a)

Topping

(a) The following cases were furnished by Mr. Dealtry :

Easter term 1810. A writ of certiorari issued, at the instance of the crown, to remove an indictment from the quarter sessions for the county of *Southampton*, against *William Ogilvy*, for feloniously stealing 30 pounds weight of candles, the property of his majesty. The defendant, being in *Chelmsford* gaol, a writ of habeas corpus issued to bring him into the Court of King's Bench ; and he being brought up in the following term, pleaded not guilty, and was committed to *Winchester* gaol. The record went down for trial at nisi prius before *Wood B.*, at the summer assizes for *Hampshire* in 1810, and *Ogilvy*, being convicted, received sentence in the Court of King's Bench in *Michaelmas* term following, to pay a fine of one shilling, and to be kept to hard labour in the house of correction at *Winchester* for six months.

Where the crown defends a person indicted, the Attorney-General is equally entitled to a certiorari to remove the indictment, as a private prosecutor would he, or as he would be if prosecuting for the crown. *Rex v. Stannard, Hil. 31 Geo. 3. 4 Term R. 161.* And at the instance of defendants, where an impartial trial is not likely to be had, the Court has granted writs of certiorari to remove the indictment from the Courts below, in order for trial at the assizes.

20th November 1786. Mr. Rous moved, on behalf of *John Ward*, for a writ of certiorari to remove an indictment for petty larceny, found against him at the sessions holden for the borough of *Colchester*, in the county of *Essex*, upon an affidavit shewing that the defendant was not guilty of the fact, and that, from the prejudice of the recorder, and the town clerk, whose advice the mayor takes in all cases that come before him for trial, he cannot have a fair and impartial trial. Having pleaded not guilty at the sessions, he applied to be bailed till the next sessions to try the indictment, but the recorder refused, and committed him as a felon ; but he has since been brought before a judge by writ of habeas corpus, and admitted to bail for his appearance at the next sessions at *Colchester*. The Court granted a rule to shew cause ; but no cause being shewn, the rule was made absolute, and the indictment being removed, the defendant pleaded not guilty in the Court of King's Bench, and the record went down to be tried at the assizes for the county of *Essex*, where the defendant was acquitted.

In

Topping and *Lawes*, who now appeared for the justices, submitted to what the Court should think fit, only they stated that the justices were not aware of any prejudices subsisting against the prisoner, and referred to

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In *Trinity* vacation 1798, Lord *Kenyon* granted a writ of certiorari to remove an indictment, found at the midsummer quarter sessions of the peace for the county of *Cumberland*, against *William Bam* Esq. and *Charles Cobbe Church*, clerk, for feloniously stealing muskets, bayonets, and cutlasses, of the value of 60*l.*, at the instance of the defendants; and they having pleaded not guilty in the Court of King's Bench, were tried at the assizes holden for the county of *Cumberland* in the summer of 1799, and being acquitted, judgment was in *Michaelmas* term 1799 entered up for them in the Court of King's Bench.

2d *January* 1807. Mr. Attorney-General having granted a warrant for an application to be made to the Lord Chief Justice, or other Judge of the Court of King's Bench, for a writ of certiorari to remove an indictment against *Samuel Jones*, an officer of the excise, for feloniously stealing 90 pounds weight of hay, Lord *Ellenborough* was attended on the 3d of *January* upon this application, when his Lordship directed enquiry to be made as to the recognizance taken in the case of *Bam* and *Church*, above referred to; and his Lordship being again attended on the 5th of *January*, took a recognizance by four manucaptors, in 40*l.* each, for the appearance of *Jones* in the Court of King's Bench to answer the indictment, and signed a fiat for the writ of certiorari. The indictment being accordingly removed into the Court of King's Bench, the defendant there pleaded not guilty, and was tried at nisi prius at the spring assizes for *Gloucestershire*, and acquitted.

The following authorities are express that an issue joined in the Court of King's Bench in a criminal prosecution must be tried at the bar, unless Mr. Attorney-General grants his warrant for a trial at nisi prius, viz. *Mich. 3 Ann., Regina v. Banks, Knt., 6 Mod. 246. Hil. Crr. 1. Fayrwether's case, Cro. Car. 348. Trin. 29 Eliz., Knevil and Taylor's case, 2 Leon. 110. Fitzherbert's Natura Brevium, 546. 2 Inst. 424.*

Several indictments for misdemeanors have been removed from the sessions of the peace for the city of *Rocheſter* into the Court of King's Bench,

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to the consideration of the Court the clauses of the governing charter of the city, (*Car.* 1. 1630.) by which the mayor, recorder, eldest alderman, and last mayor, are appointed justices, with power to any two or three, of whom the mayor or recorder to be one, to enquire of all murders, felonies, &c. committed within the city, liberty, and precincts thereof, and to be justices of gaol delivery of the city, so that all writs be directed to the ministers of the mayor, and by them executed without any writ to the sheriff of *Kent*, with a non intromittant as to the keepers of the peace and justices of oyer and terminer, in the county of *Kent*.

The Attorney-General, Park, and Jervis contra, denied that the effect of the charter was to take away the power of this Court to remove the indictment, or the prerogative of the crown to have it removed; which perhaps might have been done by the Attorney-General ex officio, though it is more proper that it should be done upon his application by the Court. And as to the trial of this indictment they cited 2 *Hale P. C.* ch. 6. p. 39. 40. ch. 56. p. 403. 404. *Hawk. P. C. B.* 2. ch. 7. s. 17. 18. ch. 23. s. 146. ch. 42. s. 4.

Lord ELLENBOROUGH C. J. I have been enquiring of the officer if the practice is, as I supposed it to be,

Bench, and the defendants having therepleaded to issue, have been tried at the assizes at *Maidstone*; and a man of the name of *Underbill*, being convicted upon such an indictment very lately, received judgment in the Court of King's Bench. See also *R. v. Perry*, 5 *T. R.* 478.

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and find that the Attorney-General has not the power of himself to issue a certiorari, but must make application to this Court; but upon such his application being indorsed, it is a matter of course with the Court to grant the certiorari. This being the practice, there can be no resistance to the certiorari in this case. Whether the Attorney-General shall consent to a writ of nisi prius, or whether the prisoner shall be tried at the bar of this court, is a matter for future consideration. There is no doubt that he may be tried by the Justices at nisi prius: the authority of Lord *Hale* seems to be decisive on that point. Although I do not find in the 14th of *Hen. 6. c. 1.* any words expressly empowering the Justices of nisi prius to enquire of felonies, yet certainly a practice of this sort has prevailed from the time of that statute down to the time of the stat. 25 G. 2. c. 37. The 14 *H. 6. c. 1.* enacts that the justices before whom inquisitions, inquests, and juries shall be taken by the king's writ of *nisi prius*, shall have power in all cases of felony (within which murder is included) and treason, to give their judgments as well where a man is acquitted as where he is attainted, the day and place where the said inquisition, &c. be so taken, and from thenceforth to award execution. The justices therefore are empowered by this statute to go the length of awarding execution without remitting the transcript of the record to this Court, though it seems they may return the *postea* into the King's Bench, and there judgment may be given. The 25 G. 2. c. 37. indeed which makes immediate sentence, and execution the next day but one after sentence, necessary, except for reasonable cause, seems to confine this jurisdiction in cases of murder

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murder in a great degree to the judicature which tries the offence. But with this at present we have nothing to do. We think that the Attorney General is entitled to the certiorari, and as a consequence to the habeas corpus.

Per Curiam, (a)

Rule absolute. (b)

(a) *Dampier J.* was absent.

(b) The prisoner (as we were informed) was afterwards tried at the Kent spring assizes, before *Bayley J.* at nisi prius, and was found guilty, subject to a point reserved.

END OF MICHAELMAS TERM.

C A S E S

ARGUED AND DETERMINED

IN THE

1816.

Court of KING's BENCH,

IN

Hilary Term,

In the Fifty-sixth Year of the Reign of GEORGE III.

IN the last vacation Mr. Justice *Chambre* resigned his seat upon the bench.

A few days before the commencement of this term Mr. Justice *Heath* died at his house in *Bedford-Square*.

At the beginning of this term *James Allan Park*, Esq. was called Serjeant, and gave for his motto "*qui leges juraque servat*," and was appointed to succeed Mr. Justice *Chambre* as one of His Majesty's Justices of the Court of Common Pleas, and was afterwards knighted.

On *Saturday* the 3d of *February*, Mr. Justice *Dampier*, who had been prevented by severe illness from attending the sittings at *Serjeants' Inn*, or during any part of this term, died at his house in *Montague-Place*.

Non erit profecto tibi, quod scribo, hoc novum, illum nullius rei, quæ quidem esset in his artibus de quibus aliquid existimare possem, rudem aut ignarum esse visum.

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At

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At the end of the term *Charles Abbott Esq.* was called Serjeant, and gave for his motto "*Labore*," and was appointed to succeed Mr. Justice *Heath* as one of His Majesty's Justices of the Court of Common Pleas, and was afterwards knighted.

Ex parte JONES and Others.

If the names of two partners in trade appear (among others) on the certificate of registry, as owners of a ship, the registry acts do not prevent the showing how and in what proportions the several owners are respectively entitled, and though the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property.

UPON the petition of *Jones* and others to the Lord Chancellor, praying him to pronounce certain ships, and the shares thereof respectively, in which *S. Holland* and *T. S. Williams*, bankrupts, were in any way interested, to be the separate property of each of the bankrupts, and divisible among the respective separate creditors, a case was submitted to this Court for their opinion, which in substance was thus :

S. Holland and *T. S. Williams*, the bankrupts, were merchants and partners in *Liverpool*, trading under the firm of *S. Holland* and Co. *Holland*, before he became partner with *Williams*, carried on trade in partnership with one *Humble*, under the firm of *Humble* and *Holland*. The ship *Kingsmill* was purchased by *Humble* and *Holland* of *Swan* and Co., who transferred it to them by bill of sale of the 17th of *Sept.* 1808, and a new certificate of registry of that date was granted to them by the collector and comptroller of the customs at *Liverpool*, but neither the certificate of registry nor the bill of sale expressed that either *Humble* or *Holland* took any particular share. On the 9th of *February* following, *Humble*, by bill of sale, transferred his undivided moiety in

in the ship to *Williams*, which transfer was indorsed on the certificate of registry. The ship *Mary* (a) was registered at the port of *Liverpool* on the 8th of *December* 1808, in the names of *Holland*, *Humble*, *Matthews*, and two others (by name) as sole owners, the proportions of each not appearing on such register; but in fact *Humble* and *Holland* were entitled to one half, and *Matthews* to one eighth. *Holland* and *Williams* afterwards purchased from *Humble* and *Holland* their one half for 900*l.*, and from *Matthews* his one eighth for 250*l.*; and *Humble*, on the 25th of *November* 1809, by bill of sale, transferred his interest therein, stated to be one-fourth part, to *Holland* and *Williams*; and *Matthews* on the same day, by bill of sale, transferred to them his interest in the ship. The purchase-moneys for these shares, and also for the share which belonged to *Holland*, were paid by *Holland* and *Williams* out of their partnership funds, and the transfers of these shares appear upon the certificate of registry of the said ship, and the shares have since been sold and transferred by the assignees of *Holland* and *Williams* to a purchaser. The ship *Susannah* was registered in the names of *Humble*, *Holland*, and *Strickland*, on the 8th of *June* 1808, without stating that any particular share belonged to each. *Strickland* by bill of sale (*June* 14th, 1808) sold and transferred all his interest, stated to be one-fourth of the ship, to *Humble* and *Holland*. *Humble* and *Holland* sold the ship, then on a voyage to *Martinique*, to *Holland* and

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(a) There was another ship, called *The Lucy*, under the same circumstances as the *Mary*.

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Williams, and by bill of sale of the 7th of October 1809 transferred one undivided moiety or half-part or share thereof to *Williams*; the purchase-money for which was paid out of the partnership funds of *Holland* and *Williams*; and on the ship's return to port, an indorsement of this transfer was made on the certificate of registry. The ship was afterwards sold by the assignees of *Holland* and *Williams*, and by the assignees, together with *Humble*, transferred by bill of sale to a purchaser for 1200*l.*; *Humble* joining in the bill of sale, in order to transfer his legal interest in the other undivided moiety, which by inadvertence had not been transferred by him in the bill of sale to *Williams*, although the whole of his share therein had been agreed to be purchased, and had been paid for by *Holland* and *Williams*. The interest of *Holland* and *Williams* in all these ships was considered by them before their bankruptcy as partnership property, was wholly paid for out of their partnership funds, and treated by them as such; the outfits, repairs, and disbursements of the same, having been charged by them to the debit, and the freight and earnings carried to the credit, of the partnership.

The question for the opinion of the Court is, whether under the circumstances of this case the interest of the bankrupts in these vessels, or any, and which of them, is to be considered as joint or separate property.

Richardson, for the petitioners, contended that the interest of the bankrupts in all the ships was to be considered as a separate interest. First, he said, that part-owners of a ship are, like partners in trade, tenants in common, and not joint-tenants, between whom there is

no

no survivorship, but the share of each of them shall go to his executor, and the executor shall join in a writ with them who survive; nevertheless, though they have separate interests, yet all shall sue during their joint lives for any cause of action which concerns the ship, as for running it down; and if they do not, it may be pleaded in abatement. (a) So they shall all have an action for the ship's earnings, as for freight, &c. In like manner, tenants in common may avow (b), or bring trespass jointly. But whether any one be part-owner of a ship, must be determined by the register; for since the register acts they only can have any legal or equitable title whose names appear on the register. Thus, if four partners in trade jointly purchase and pay for a ship, but cause her to be registered in the names of two only, the interest cannot be averred in the four, in order to maintain an action on a policy of assurance on freight; yet in general an equitable interest is sufficient to maintain such an action. (c) So it seems a trust cannot be raised in favour of persons not named in the register. (d) So if a ship be purchased by one partner and registered in his name only, it shall enure as the separate property of that partner, although the purchase and outfit be taken out of the partnership fund, and the earnings placed to the partnership account. (e) All which decisions afford a rule to govern the present case; for first, as to the *Kingsmill*, admitting that *Humble* and *Holland* were joint-tenants, when *Humble* conveyed his moiety to

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(a) *Addison v. Overend*, 6 T. R. 766.(b) *Gulley v. Spearman*, 2 H. Bl. 386.(c) *Camden v. Anderson*, 5 T. R. 709.(d) *Heath v. Hubbard*, 4 East, 110.(e) *Curtis v. Perry*, 6 Ves. 739. *Ex parte Yallop*, 15 Ves. 60.

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Williams, the bankrupts (*Holland* and *Williams*) became tenants in common, each of a moiety, because they took by different titles and at different times; and these moieties will vest in their respective creditors. In like manner as to the *Mary*, admitting the bankrupts to have been joint-tenants of the one-fourth and one-eighth conveyed to them by *Humble* and *Matthews*, yet *Holland* held the remaining one-fourth, as tenant in common. Lastly, the whole interest of the *Susanna* being in *Humble* and *Holland* by different titles, first as joint-tenants of three-fourths, next as tenants in common of one-fourth, by the transfer of *Strickland*, they convey to *Williams* an undivided moiety, consequently *Williams* and they are tenants in common of undivided moieties. From all which it appears, that the bankrupts are severally entitled according to the legal interests vested in them by these transfers, and in respect of which they were named in the registry; for to hold them entitled to any greater extent, would be nothing less than setting up a trust for one in a part for which he is not named in the registry, because he is named for another part.

Scarlett, contra, argued that the interest of the bankrupts was a joint interest. For before the passing of the register acts (a), a parol contract accompanied by delivery of the ship was sufficient to convey the interest; and therefore the acts require that the transfer should be by some instrument in writing. (b) Wherefore before those acts, if two partners had brought a ship, like any other chattel, into the common stock, and used it

(a) 26 G. 3. c. 60. 34 G. 3. c. 68.

(b) 34 G. 3. c. 68. s. 14.

as such, sharing the amount of profit and loss thereon, it became the joint property so far as it regarded the joint creditors, though as between the partners themselves, each might severally be interested in unequal proportions. The register acts have made no difference in this respect, for they were passed chiefly with a view to prevent the existence of foreign interests in British ships, and with this view they require the name of the owner and part-owners to be stated (a); but this being done the act is satisfied, neither the nature nor the proportion of interest need be stated. Provided all those who are any wise interested in the ship, are named in the registry, it concerns not the public to know in what particular union or division of interest they stand towards each other; accordingly the statutes provide for all transfers of the property in any ship from one subject to another (b), but make no mention of the variation of interest between part-owners themselves. As to *Curtis v. Perry* and *Ex parte Yallop*, the registry in both those cases was in the single name of one of the partners; and this was done in one of those cases, in order to evade the provisions of a particular act of parliament, relating to the manner in which the ships were employed. (c)

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Richardson, in reply, denied that the language of 26 G. 3. c. 60. s. 17. 34 G. 3. c. 68. s. 14. 16, 17. would be satisfied by applying it to transfers made to new owners only, and not to interchanges of property among former owners; for the language of them is, so often as the property shall be transferred *in whole or in part*.

(a) 26 G. 3. c. 60. s. 9, 10.

(b) 26 G. 3. c. 60. s. 17. 34 G. 3. c. 68. s. 14.

(c) *Curtis v. Perry*.

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And it has been well said that the two acts of parliament were drawn upon this policy, that it is for the public interest to secure evidence of the title to a ship from her origin to the moment in which you look back to her history. (a)

Cur. adv. vult.

The following certificate was sent.

WE have heard this case argued by counsel, and considered it, and we are of opinion that inasmuch as the names of the two bankrupts, *Holland* and *Williams*, appear on the certificates of registry of each of the several vessels, as owners thereof, the provisions of the acts for the registry of shipping are satisfied, and that they do not operate to prevent the shewing how, and in what proportions, the several owners were respectively intitled, and that the interest of the bankrupts in each of the ships mentioned, in the above case is to be considered as a joint property.

ELLENBOROUGH.

S. LE BLANC.

J. BAYLEY.

H. DAMPIER.

7th Dec. 1815.

(a) Per Lord Aldon, *Ex parte Yallop*, 15 Ves. 60.

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ROWCROFT *against* LOMAS.Tuesday,
Jan. 23d.

ASSUMPSIT for money lent. Plea non assumpsit, and the statute of limitations. At the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after last *Trinity* term the plaintiff's demand was founded upon the following accountable receipt, "*London, 29 August 1803, received of Mr. T. Rowcroft 80l. to account for on demand.*" And in order to take it out of the statute, the plaintiff produced a witness, who proved that in 1814 he called on the defendant from the plaintiff, and shewed him the receipt, and asked him if he knew any thing of it. The defendant answered, yes, I know all about it. The witness then asked him for the amount, to which he answered, it was not worth a penny he should never pay it. He admitted his signature to the receipt. The witness said, perhaps you have paid it. He answered no, never, he never had, and never would, and added, besides it is out of date, and no law shall make me pay it. His Lordship inclined to think this evidence insufficient to take the case out of the statute, but allowed the plaintiff to recover, reserving the point. Accordingly there was a rule nisi for entering a nonsuit.

Topping and *Abbott*, who shewed cause (a), argued that inasmuch as the defendant had admitted the existence of the debt, he could not insist upon this plea; for the rule is, that wherever there is an acknowledgment

In assumpsit for money due on an accountable receipt, plaintiff, in order to take the case out of the statute of limitations, called a witness, who proved that he called on defendant, and shewed him the receipt, and asked him if he knew any thing of it, to which defendant answered that he knew all about it; witness then asked him for the amount; to which he answered, it was not worth a penny; he should never pay it; that it was his signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it:" Held that this evidence was insufficient to charge the defendant with it, for there was no acknowledgment, but the contrary, that the debt ever existed.

(a) Cause was shewn at *Serjeants' Inn* before this term.

that

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that the debt remains unpaid, this avoids the statute. As if a man says that he does not consider himself as owing a farthing, it being more than six years since he contracted, yet if he at the same time acknowledge that he has had the thing, and has paid only in part for it, he shall be liable for the residue. (a) Or if he say that since the debt became due, which is more than six years, no demand was made, this is such an acknowledgment as will warrant a jury in finding the debt. (b) In like manner, the defendant in this case has acknowledged that the paper signed by him, which constitutes the debt, has not been discharged, wherefore the law in aid of the moral obligation upon him to pay the debt will raise an implied *assumpsit* to pay it.

Scarlett and Richardson, contra, after referring to *Coltman v. Marsh* (c), were stopped by the Court.

LORD ELLENBOROUGH C.J. I think we need not trouble the learned counsel for the defendant, for it appears to me that the effect of this paper is *per se* destroyed by the lapse of six years. Something more must be proved than a bare acknowledgment by the defendant that the thing is unsatisfied, to give effect to that which is *per se* destroyed. The cases indeed have determined that a debt, the existence of which is extinct through lapse of time, may be revived by an acknowledgment that it is unsatisfied. But there must first be some acknowledgment that it ever existed. How is there any acknowledgment of the existence of this as a debt? There is an acknowledgment of some semblance

(a) *Bryan v. Horseman*, 4 East, 599.

(b) *Rucker v. Hannay*, 4 East, 604. n.

(c) 3 Taunt. 380.

of claim against the defendant, by his acknowledging that the writing is his signature ; but that does not constitute a debt, though it may give a colour for it. All this however is put an end to by the lapse of six years. Then is there one word proceeding from the defendant to recognize the receipt as having at any time a legal and obligatory effect? We find on the contrary that the defendant says it is not worth a penny; whereas if it was ever worth any thing, it was worth 80*l.*, and would still be so. Besides, he adds, that it was out of date, and he would stand upon the law. I conceive him to have said in substance, that this was a paper which originally was never worth any thing, but was a nullity, and upon which he never was liable; besides, says he, if I was liable, I am discharged by the statute. Almost all the cases upon this subject go upon the same ground as *Bryan v. Horseman*, where the defendant stood upon the statute, it being more than six years since he contracted, but in the same breath acknowledged that he had had the wheat, and had paid only in part for it, and that part remained due. Every thing which the defendant there alleged went to admit in distinct language the original foundation of the debt; only as to some part of it, he stood upon the statute on account of the lapse of time; the presumption arising from which was rebutted by his admission that a part was unpaid. But here is nothing to recognize the existence of an original debt; what it was meant to prove, it disproves, importing the contrary; instead of reviving, it extinguishes the debt, and draws the same way with the statute.

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LE BLANC

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LE BLANC J. The point to which all the cases have been directed is this, that there must be an acknowledgment of the debt within six years. The cases have gone thus far, and we cannot go beyond them, and this brings it to a question in every case, whether there has been an acknowledgment of the debt within six years. The vice of the argument in this case, is in assuming that what the defendant said is an acknowledgment by him of an obligation at a former time, whereas in the same breath he denies that it was an existing debt at a former time. In most of the cases we find some admission to have been made of the debt; as in the last case, there was an admission that the party had had the goods and that part remained unpaid. But here the defendant when he acknowledged his signature, said that he never had and never would pay it, and he gives as a reason that it was not worth a penny. This therefore so far from being any admission was a denial of any pre-existing debt. And to this he added, "Besides it is out of date, and no law shall make me pay it." These facts therefore do not seem to me to bring the case within the principle of former decisions.

BAYLEY J. If a denial were an acknowledgment of a debt, the plaintiff would have made out his case. But as this is not so, we are bound to hold with the defendant, and in so doing we shall not overturn any of the cases. The plaintiff's counsel have argued upon principles that do not meet the facts of this case. It is said by Mr. *Abbott*, that whenever the defendant by his acknowledgment, admits the existence of the debt, this is sufficient to take it out of the statute. I agree to that; but then I ask, where is any such admission?

mission? Again, Mr. *Topping* argues, if you first shew that a debt existed, an acknowledgment that it is unpaid is sufficient to take it out of the statute. This also I am not disposed to deny; but again I ask, where is the admission that a debt ever did exist. The statute of limitations proceeds on a presumption, that when a debt is really due, a party is not likely to suffer six years to elapse without procuring an acknowledgment of it. It therefore contemplates, that where there is no such acknowledgment, this must be either from the debt's having been discharged without taking a receipt, or from there never having been any debt. Now in this case the whole conversation distinctly imports that this never was a debt, but was a security given without any consideration. For what else is to be collected from the defendant's declaring that it was not worth a penny, and that he never had and never would pay it? This clearly looks to a case where a cause of action never existed upon the instrument. In *Bryan v. Horseman* the defendant relied on the statute of limitations only, but in the same breath admitted that 26*l.* were due; therefore he had taken a wrong view of the statute, because the statute was not intended to protect a party from a debt acknowledged to be existing, but only where the presumption arising from the lapse of time is, that it never did exist, or if it did, that it has been discharged. Therefore when the defendant in that case admitted the debt, he admitted that this was a case to which the statute according to its spirit did not apply.

Rule absolute.

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 against
 LOMAS.

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SEBAG *against* ABITBOL.

A bill of exchange payable at a banker's in *London*, which, by reason of being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid, was held not to be discharged, but that the drawer might set it off in an action brought against him by the acceptor, although the bankers at whose house the bill was payable failed in the interval, and the acceptor had at all times up to the failure of the bankers a balance in their hands sufficient to cover the acceptance.

AT the trial of this cause before Lord *Ellenborough* C. J. at the *London* sittings after *Trinity* term, the question was, whether the defendant was entitled to set off 100*l.*, the amount of a bill of exchange accepted by the plaintiff. The bill was drawn by the defendant, and accepted by the plaintiff, on the 27th of *Nov.* 1812, payable to the order of the drawer three months after date, at *Whitehead* and Co.'s, bankers, *London*. The bill was never presented at *Whitehead's* for payment, nor was payment demanded of the plaintiff; and it appeared that the defendant, in answer to a letter written by the plaintiff in *May* or *June* 1814, requesting that the bill might be returned to him, informed the plaintiff that it had been mislaid. It farther appeared, that upon search made in *June* and *July* of that year, the bill could not then be found, but it was afterwards discovered among some old papers of the defendant. In *November* 1814 *Whitehead* and Co. became bankrupt, and it was admitted that the plaintiff had, at the time when the bill became due, and up to the time of *Whitehead's* bankruptcy, a balance in their hands more than sufficient to pay the bill. There was a verdict for the plaintiff for the 100*l.* thus claimed to be set off, and the point was reserved.

Park in the last term obtained a rule nisi for entering a nonsuit.

Topping

Topping and *Campbell* shewed cause (a), and argued, that the plaintiff was discharged from his acceptance upon two grounds; 1st, because the bill being accepted payable at a particular place, presentment ought to have been made at the place, *Callaghan v. Aylett* (b), *Gammon v. Schmoll* (c); for this acceptance is an undertaking that he will have funds at the place; and accordingly it appears that the plaintiff always, until the bankruptcy of *Whitehead*, had funds there to cover his acceptance. 2dly, Granting that this was not such a special acceptance as required a particular presentment, yet being in the nature of a draft upon the bankers, according to *Bishop v. Chitty* (d), when a reasonable time for receiving it is elapsed, it is always considered as actual payment, otherwise the party might be obliged to keep funds there for ever. Wherefore in this case a reasonable time having elapsed, it must be taken that the defendant gave credit to the bankers, who having failed, the loss shall be his loss, and not the plaintiff's loss. This mode of considering the case will leave the authority of *Fenton v. Goundry* (e) undisturbed.

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LORD ELLENBOROUGH C. J. Laches is a neglect to do something which by law a man is obliged to do. Whether my neglect to call at a house where a man informs me that I may get the money, amounts to laches, depends upon whether I am obliged to call there. This acceptance, though it might be an authority to the bankers to pay the bill, being made payable at their house, is not in express terms an order upon

(a) Cause was shewn at *Serjeants' Inn* before this term.

(b) 3 *Taunt.* 397.

(c) 5 *Taunt.* 344.

(d) 2 *Str.* 1195.

(e) 13 *East*, 459.

them

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them to pay, as was the case of *Bishop v. Chitty*, where the language of the acceptance was immediately that of a cheque upon the bankers. I confess I am unable to see any laches in the defendant upon either ground. The plaintiff is informed the bill is not to be found, after which there surely was not any occasion for him to keep a fund at the house where it was made payable. How can it be said that the plaintiff, after notice that his bill no longer existed, was bound to keep money at his banker's to answer the bill *in perpetuum*? It seems to me, that after such a notice he was at liberty to withdraw his funds, and therefore whatever loss may happen to him by keeping them there, must be his loss, and not the loss of the defendant.

LE BLANC J. I think this case by no means draws into consideration the cases of *Fenton v. Goundry* in this court, and *Gammon v. Schmoll*, and the other cases, in the court of Common Pleas, where a difference of opinion betwixt the two courts is supposed to have obtained. Whatever may be the ultimate decision of the point discussed in those cases, the present seems to me to be perfectly clear of them. For if we admit the effect of making this acceptance payable at a particular banker's, was to make it a draft or check on the banker, and according to this view of the case that the holder would in general be guilty of laches if he did not present it at the bankers within a reasonable time, yet in this case, where the bill was mislaid, and the acceptor had notice of that circumstance as much as fourteen or fifteen months after the time when it ought to have been forthcoming, he was no longer bound to keep funds at his bankers to answer the acceptance. Therefore it

cannot be imputed to the holder that he was the cause of this loss, or had made the bill his own by laches; and on this view of the case alone I found my opinion. For admitting that the defendant is to be considered as the holder of a banker's check, yet when he gave notice that it was lost, the plaintiff was at liberty to withdraw his funds if he had pleased, and therefore he shall not be allowed to make the loss arising from the insolvency of his own bankers the other's loss. Wherefore I think this rule ought to be made absolute.

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 against
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BAYLEY J. I am of the same opinion. It seems to me that this is an attempt on the part of the plaintiff to cast upon the defendant a loss which he ought to bear himself. The plaintiff had funds at the house of *Whitehead* and Co., who failed, having those funds in their hands; and now he says that 100*l.* of those funds ought to be placed to the loss of the defendant; because he, the plaintiff, having given an acceptance payable at the house of *Whitehead*, if the defendant had resorted thither for payment when the bill became due, his balance at the bankers would have been 100*l.* less than it was at the time of their failure. But I do not know that. It does not appear that he kept more than the usual balance at his bankers, and it is probable that he would still have kept the same. If it had been shewn that he kept an 100*l.* extra specifically for the purpose of answering this bill, perhaps it might have varied the case, though I do not say it would. But looking at his account from time to time at his bankers, he must have seen long after the bill became due, that the 100*l.* was not brought into charge against him. This went on for upwards of a whole year, and afterwards, when fourteen or fifteen

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months have elapsed, he has distinct notice of the loss; after which he might well reckon that the bill was not likely to be brought into charge against him, and it became imprudent in him to lock up 100*l.* at his bankers to meet it. It is said there was always a chance of the bill being found; but if there was, yet no blame would have been imputable to him for not keeping funds to meet it; because when the bankers saw the bill was out of date, they would in common prudence refer to their principal to know how a bill which was so long mislaid was now forthcoming. It does not appear to me then that we can say the plaintiff has suffered any loss at *Whitehead's* by reason of the laches of the defendant. As to the other point, on which there has been some difference of opinion in the two courts, I shall be very ready to change my opinion, if ultimately I should see occasion; but I cannot help feeling considerable difficulty upon that point. If this is to be considered as a qualified acceptance, it follows that the holder would have a right to refuse it, he being entitled to have an unconditional acceptance; and indeed, as I rather think, being bound to require it. And if he take such an acceptance as this, payable at a particular place, it may be a question whether he ought not to give notice to all the parties to the bill, and whether by omitting to do so he does not discharge them. In this view of the question it becomes an important one, and deserves to be well considered. It is true that the holder is not bound to present the bill for acceptance; but I have always understood that if he does present it, and a qualified acceptance is given, he is bound to give notice. If then the circumstance of the bill's being accepted payable at a banker's, is to throw on the holder the

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the obligation to present it at the particular place, the consequence will be that any intermediate indorser who may be called on to pay, and does pay the bill, will in his action over against another party to the bill, be saddled with the proof of an additional fact beyond what he would have to prove if the acceptance were a general acceptance. This is a point of view that seems to me to be very important, and I rather think that it has not been presented in this view to the minds of those learned persons from whom we are said to differ.

Rule absolute,

Tindal was to have argued in support of the rule.

HOLT *against* MEDDOWCROFT.

Tuesday,
Jan. 23d.

THE plaintiff obtained a rule for a special jury, which was regularly struck, but a common jury panel was returned together with the special jury panel, and at the trial, at the last assizes (*a*), none of the special jury attending, it was proposed on the part of the plaintiff to try the cause by a common jury; to which the defendant's counsel objected that this could not regularly be done; but the judge finding a common jury panel annexed, was of opinion that he ought to try the cause, and the cause was tried and there was a verdict for the plaintiff, the defendant's counsel appearing, and making defence.

Where a common jury panel was returned, together with a special jury panel, and no special jurymen appearing, the cause was tried by a common jury, the trial was set aside.

Scarlett, in the last term obtained a rule nisi for setting this verdict aside, and for a new trial, on the ground

(*a*) On the Northern Circuit.

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that here was a mistrial, for that the defendant by appearing and making defence, did not waive the objection which he made in the outset to the cause being tried, and by statute 3 G. 2. c. 25. s. 15. it is enacted that the jury struck, shall be the jury returned for the trial of the issue. And if the jury do not appear then, they must come at another time, for the party cannot have a new special jury (a), and a fortiori he cannot have a common jury.

Topping, Raine, and Richardson who shewed cause (b) argued that the statute does not prohibit the trial of a special jury cause by a common jury, where there is a common jury panel returned, for the statute useth not any negative words, but only that the jury struck, shall be the jury returned for the trial of the issue. And allowing this to be an irregularity, yet the defendant has waived it by consenting to make his defence, and taking the chance of a verdict in his favor, in which event he would not have complained of the irregularity. In *Rex v. Franklin* (c) it is said to have been adjudged 13 W. 3. that if a rule is made for a special jury, and the parties proceed to trial before a common jury, the verdict shall not afterwards be impeached, for the defendant must either challenge the array, or let judgment go by default; but if he appear, and a defence be made, he is by that precluded from making any objection to the jury afterwards. So if the sheriff being ruled to return a special jury, return only a common jury, after trial the defendant shall not have a new trial if he has made

(a) *Rex v. Perry*, 5 T. R. 453.

(b) Cause was shewn at *Serjeants' Inn* before this term.

(c) Cited 5 T. R. 456.

defence;

defence; *secus* if he hath not made any defence (a). And it may be taken for a rule, that where a man has matter of defence, and knowing thereof goes to trial, and puts the plaintiff to the charge of proving his issue, he shall never after, in respect to that matter, have a new trial. (b) So if there be any objection to the granting a special jury, it shall be cured by the plaintiff's appearance. (c)

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LORD ELLENBOROUGH C. J. What might have been the effect of the defendant's appearing at the trial and making a defence without any protest against trying the issue, it is unnecessary at present to inquire, because we find that the defendant did protest and did all in his power to resist the proceeding. I cannot agree that it amounts to a consent on the part of the defendant, because being as it were tied to the stake, and dragged on to trial, he endeavours to make the best of it. The language of the statute does, I think, import a negative, and it may be very doubtful whether the witnesses would be indictable for perjury upon a trial such as this. That is a mischief which, I think, shews that the verdict ought to be set aside.

LE BLANC J. It frequently occurs that none of the special jurymen appear at the trial, in which case the practice is uniform, that the cause goes over.

BAYLEY J. The sheriff had no authority to return a common jury panel, the sheriff is only directed to return the twelve special jurymen.

(a) 12 Mod. 567.

(b) *Ib.* 584. per Gould.(c) Per Lord Ellenborough, *Massey v. Johnson*, 12 East, 69. n.

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Tuesday,
Jan. 23d.HOAR *against* MILL.

Where plaintiff declared in covenant, that defendant demised to him a wharf and storehouses, &c., the word in the deed being *storehouse*: It was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only, upon a covenant by defendant; not to suffer a wharf to be erected on his estate to the injury of the said wharf. *per quod* plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, store-room, &c.

IN covenant the plaintiff declared that by indenture made between him and the defendant, the defendant demised to him, all that wharf or deal pound, &c. the wharf, stage, and storehouse on the wharf or stage, the *storehouses* and dwelling-house adjoining, &c. together with all the wharfage and storeroom of all goods landed or shipped therefrom, &c. for a term of years; and the defendant covenanted that he would not suffer any wharf to be erected on his estates to the injury of the said wharf; and the plaintiff assigned for breach, that the defendant did suffer a wharf to be erected on his estate, and continued there, *per quod* the plaintiff had been deprived of divers gains which would otherwise have accrued to him for wharfage dues, storeroom, &c. And upon non est factum, the indenture being produced at the trial before *Chambre J.* at the last *Hauts* assizes, the demise was of the *storehouse* and dwelling-house adjoining, &c. in the singular, and not storehouses, which the learned judge held to be a variance and directed a nonsuit.

Gaselee, in the last term, obtained a rule nisi for a new trial; for that this variance was in a thing immaterial, there being no breach assigned upon any covenant which respected the storehouse; and therefore this was not like *Pitt v. Green (a)*, where the variance was in a thing upon which a breach was assigned, and it was resolved that the plaintiff could not waive the

(a) 9 East, 188.

damages upon that breach. So if in an action for non-residence, the parish be miscalled, this is a material variance. (a) But where in debt on a mortgage deed, the plaintiff declared that the obligor thereby bound his *heirs* as well as his executors and administrators, the obligation being without the word *heirs*, it was resolved that this was not a fatal variance, for it was indifferent as to the then action whether the heirs were bound or not. (b) So it may be argued in this case.

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 against
 MILL.

Pell Serjt., Burrough, and Selwyn, who shewed cause (c) argued that in all actions founded upon contract, it is necessary to prove the contract as set out in the declaration, and if it be different in any part the action fails. The reason of which is because the contract is entire. Wherefore a misrecital of the thing demised (d), or of the name of the tenant who last occupied (e), have been held fatal. And as to what shall be such a literal omission as would be fatal, it is laid down by *Powys J.* that where a letter omitted or changed makes another word, this is a fatal variance, otherwise where the word continues the same. (f) Now here a letter is omitted in the demise which is stated in the declaration, and makes another word, unless one storehouse is the same as many storehouses; and thus the demise declared upon is different from that which is proved. And upon non est factum which puts in issue the demise, this word cannot be rejected as surplusage, because it is descriptive of the demise itself.

(a) *Wilson v. Gilbert*, 2 B. & P. 281.

(b) See *Hamborough v. Wilkie*, n.

(c) Cause was shewn at *Serjeants' Inn* before this term.

(d) *Pitt v. Green*, 9 East, 188.

(e) *Bowditch v. Mawley*, 1 Camp. N. P. C. 195.

(f) *Regina v. Drake*, Salk. 660. 2d resolution.

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 HOAR
 against
 MILL.

Gaselee, Casberd and *E. Lawes* contra, argued as before upon moving for the rule; and further that *storehouse* in the singular might well be considered as *nomen generale*; as the custom-house, or a chamber in an inn of court, are understood of more than one house or room. And if so, the judge instead of directing a nonsuit ought to have left the question to the jury. And as to the rule laid down by *Powys*, it is not so at this day, for it is now held that unless a literal omission or variance alters the sense, it is not fatal. (a) And the doctrine in *Hamborough v. Wilkie* is not new, for the same was held in *Roberts v. Harnage* (b); and in *Bristow v. Wright* (c), Lord Mansfield agreed that impertinent matter, irrelevant covenants for instance, may be rejected by the Court, and need not be proved. And it is only where that part of a deed on which the action is founded is misrecited, that it is fatal. Now this action is not founded upon any covenant which regards the storehouse, so that the recital of that part of the demise is perfectly foreign to the cause.

LORD ELLENBOROUGH C. J. There is a damage alleged in respect of store-room. I confess that I have felt more embarrassed by the case of *Hamborough v. Wilkie* than by any other that has been cited; for, independently of that case, this being an action founded on a demise, and taking *storehouses* to be an affirmation that more than one were demised, I should have held this variance to be fatal. Perhaps it may be said of *Hamborough v. Wilkie*, that the word *heirs* was perfectly

(a) *King v. Pippet*, 1 T.R. 235. *Cunning v. Sibly*, cited *ibid.* 239. *Rex v. Marsack*, 6 T.R. 776. *Judge v. Morgan*, 13 East, 547.

(b) *Salk.* 659.

(c) *Dougl.* 667.

impertinent,

impertinent, and so might be rejected; yet the difficulty still occurs that the deed being the very foundation of the action, the word *heirs* was misrecited as being part of the deed. However this may be, I believe it is better to adhere to the other authorities, embarrassed as I am by that. It seems to me the safer rule to hold this to be a variance. A damage is alleged in respect of store-room.

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 against
 MILL.

LE BLANC J. A distinction has always been observed betwixt setting out that which is the very ground of action, and that which may be rejected as impertinent matter. This distinction was particularly noticed by Lord Mansfield in *Bristow v. Wright* (a), where it was perfectly immaterial whether the rent was reserved payable quarterly or not, yet as the plaintiff undertook to state the lease, and stated it incorrectly, it was resolved to be a fatal variance. In the present case the lease is the very ground of action, and it was necessary for the plaintiff to set out at least so much of the premises demised as the breach of covenant relates to, for the covenant is, not to suffer a wharf to be erected to the prejudice of the plaintiff's wharf. Therefore the setting forth the things demised was not wholly impertinent, though as to this particular thing it might be unnecessary. Nevertheless, the plaintiff in stating it undertakes to state it correctly, and he has not done this; the variance therefore seems to be fatal. This distinction of its not being wholly impertinent is, I confess, the only way in which I am able to differ it from the case of *Hamborough v. Wilkie*, where the word *heirs* might be

(a) Dougl. 667.

considered

1816.

 HOAR
 against
 MILL.

considered as wholly impertinent. If this be thought insufficient, and it becomes necessary to surrender the authority of that case, I should think it better to do so, in order to adhere to the rule as it regards the setting forth the particulars of any contract, on which the action is founded.

BAYLEY J. I have always understood the rule to be, that a variance is fatal, unless it be in a matter which the Court would have directed to be struck out on motion, for then it may be rejected as surplusage. In *Hamborough v. Wilkie* I certainly consider that the word *heirs* was impertinent, and that the Court would have ordered it to be struck out.

Rule discharged. (a)

Thursday,
 Jan. 26th. 1815.

(a) HAMBOROUGH against WILKIE.

In debt on a mortgage-deed for non-payment of the mortgage-money, plaintiff declared that defendant bound himself, *his heirs*, executors, and administrators, and proved a deed in which defendant bound himself, his executors and administrators only: Held that this was not a material variance.

In debt upon a mortgage deed for non-payment of the mortgage money, the plaintiff declared that the defendant bound himself, *his heirs*, executors, and administrators to pay the mortgage money. And upon non est factum, the deed being produced at the trial before Lord *Ellenborough* C. J. at the last *London* sittings, it appeared that the defendant only bound himself, his executors, and administrators. It was objected that here was a variance in the description of the deed in a material point, such as upon oyer and demurrer would have been fatal; and thereupon a nonsuit was prayed. His Lordship inclined to think this not a material variance, and directed a verdict for the plaintiff.

Comyns now renewed the objection upon motion to enter a nonsuit, and he said that a deed which binds a man's heirs, executors, and administrators, and one which only binds his executors and administrators, are materially different in this respect; that in one case the heir shall be liable, and an action lies against him in respect of the lands, in the other not. Therefore here the plaintiff has declared upon a deed, the effect of which is to charge the lands in the hands of the heir, but has proved a deed which does not bind the lands. And he cited *Bristow v. Wright*. (a)

(a) *Doug.* 665.

But *per* Lord ELLENBOROUGH C. J. This is surplusage as between these parties. It is immaterial to the present case both in consequence and effect, whether the defendant bound his heirs or not.

And *per* BAYLEY J. The judgment would bind his heirs, whether he bound them by the deed or not. It was immaterial as between these parties whether the heirs were bound or not.

Per Curiam, (a)

Rule refused.

(a) *Dampier J.* was absent.

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HAMBOROUGH
against
WILKIE.

HUDSON and Another *against* ROBINSON.

Tuesday,
Jan. 23d.

ASSUMPSIT for the non-delivery of a quantity of copperas; also for money had and received. The defendant pleads in abatement, that the promises were made jointly with one *Caleb Angus* and one *Cuthbert Brown, &c.*, and not by the defendant alone. Issue thereon.

At the trial before *Bayley J.* at the last *Northumberland* assizes, the plaintiffs failed in proving the special counts; but rested their case upon the count for money had and received, under the following circumstances:

The defendant was partner with *Angus* and *Brown* in a copperas manufactory, and employed a broker to sell a quantity of copperas, being 20 tons, part of the partnership stock, telling him that he would deliver it as his own, if any objection should arise on the part of his partners. Before this time *Angus* had wholly conducted the partnership business, and the defendant had never interfered in it. The broker sold the copperas to the plaintiffs under a contract which was signed by the defendant for *C. Angus and Co.* The bill of parcels was

In assumpsit against one of several partners for not delivering goods, with a count for money had and received, to which defendant pleaded that the promises were made jointly with *A.* and *B.*, it appeared that defendant being partner with *A.* and *B.* made the contract individually, though in the name of the partnership, and for the sale of partnership property, and that in fraud of his partners he received the money to his own use, though the bill drawn by him for the money was in the partnership name: Held that plaintiff might recover

the money so received under the common count. And *A.* was held a competent witness for the plaintiff to prove that defendant was never authorised or employed by the partners to make the contract, and that he received the money to his own use.

also

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—
HUDSON
against
ROBINSON.

also made out by the defendant in the name of the firm, viz. "Bought of *Angus* and Co. 20 tons of green copperas, at 7*l.*—140*l.*" And a bill of exchange for the amount was drawn upon the plaintiffs by the defendant, signed by him, *For C. Angus and Co.*, which the plaintiffs accepted, and paid when due. Only one ton of the copperas was ever delivered to the plaintiffs. The plaintiffs called *Angus* as a witness to prove that he had never authorized this bargain, nor had ever agreed to it; and that previously to this time he had exclusively conducted the sales of the concern himself, and the defendant had never been employed to make sales. That the money for this copperas had been received by the defendant alone, and had never been brought to account; and that the partnership accounts were still unliquidated, and in Chancery. It was objected, that *Angus* was an incompetent witness for this purpose; for this was in effect, by his own testimony, to rid himself of a joint liability with the defendant, for such would be the consequence of a verdict for the plaintiffs, in support of which he was called. Also, that this was not money had and received by the defendant alone to the plaintiffs' use, because it was the produce of the bill, which, like the bill itself, was partnership property. The learned Judge overruled the objection to the competency of *Angus*; and held that this might be considered under the circumstances as money had and received by the defendant alone; and so there was a verdict for the plaintiffs.

A rule nisi was obtained in the last term for setting the verdict aside on these grounds.

Scarlett and *Littledale* shewed cause (a), and argued that *Angus* was a competent witness, he not being inte-

(a) Cause was shewn at *Serjeants' Inn* before this term.

rested in the event of the suit; for although the plaintiffs have recovered a verdict against the defendant alone, yet is *Angus* liable to an action at the suit of the defendant for contribution, in which action *Angus* cannot avail himself of this verdict, to give it in evidence to shew that he is not jointly liable. Upon the other point they said, that here was evidence to charge the defendant alone upon the count for money had and received; for the sale by him of the partnership property, was in fraud of the other partners, and the defendant received the money as his own, and not as belonging to the partnership.

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Topping and *Tindal*, contra, maintained, that in order to judge whether this was money had and received by the defendant alone, it was proper to look to the contract under which it was received, and not to the misappropriation of it afterwards. That looking to that, it appeared by the contract itself, by the bill of parcels, and the bill of exchange which was drawn in payment of the goods, that this was a partnership transaction. Next, as to the competency of *Angus*, it is a difficult proposition to maintain that where the issue was whether the defendant was individually liable, or whether *Angus* was not also jointly liable with him, *Angus* was not interested in denying his own liability, and thereby enabling the plaintiffs to recover against the defendant alone; which is a direct interest in the event of the suit; because this recovery will for ever bar the plaintiffs from having an action for the same cause against *Angus*. And as to the argument that *Angus* is now become liable to an action for contribution at the defendant's suit, it may be questionable whether this verdict would not
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estop the defendant from averring that the contract was joint, since it has been found against him, that it was separate; but admitting that he might aver it, still *Angus* was interested in fixing the defendant with the contract, and leaving it to him to sue for contribution, because in such an action *Angus* will be entitled to a set-off. So that in every way of considering it, *Angus* may be said to have been directly interested in the event of the suit. Yet it may be doubtful whether a less degree of interest, than a direct interest in the event of the suit, does not afford a good objection to the competency of a witness; as if he be interested in the subject matter of the suit, or by a promise of money, or the like.

LORD ELLENBOROUGH C. J. I own that, on the best consideration I am able to give to this case, I think the verdict is right. It is said that an action for money had and received is not maintainable in this case. But an action for money had and received is maintainable wherever the money of one man has, without consideration, got into the pocket of another. Here the money of the plaintiffs has got into the pocket of the defendant; and the question is whether this has been without any consideration. The consideration was the supposed right of the defendant to dispose of the goods as partnership property, which was the inducement to the plaintiffs to give this bill, under which they have been obliged to pay the money. The defendant had no such right; therefore the absence of any consideration entitles the plaintiffs to maintain this action, and still more so where the money has got in to the defendant's pocket through the medium of a fraud. For what is this transaction? It appears that the defendant represented to

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to the broker that the subject-matter of this contract was one in which he had not an uncontrollable interest, for he stated it as possible that his partners might repudiate it, but he added that if they did, he would take upon him to deal with it as his separate property. He contracted therefore to do, what was in violation of his duty as a partner, namely, to sell as partnership property that which he had no control over in that character. This then was property of which the plaintiffs have lost the benefit by reason that the defendant had not any power to dispose of it. The next question is, whether *Angus* was a competent witness. It has been argued very ingeniously against his competency, and the argument has not failed at times to raise doubts in my mind, whether the objection was not well founded. But on the best consideration, I think *Angus* was a competent witness. To illustrate this by what has here taken place: this action has been decided against the defendant; but the defendant is not thereby precluded from suing the other partners for contribution, provided he can establish by evidence his claim against them as partners. The record in this action will not operate as an estoppel against him on that occasion, because there is no mutuality out of which the estoppel can legally grow, and without a mutuality there can be no estoppel. It is therefore no objection to his suing that this record shews he was not a partner. If it could be used for that purpose, the objection might be good; but this record can only be used as a medium of proof to shew that the now defendant has paid a certain sum of money. *Angus* was called to prove that they were not partners in this transaction; but if it should turn out that they were, it does not follow that *Angus* will be

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be guilty of perjury: it may arise from a misapprehension either of the fact or the law, which would excuse him from the crime of wilful and corrupt perjury. The defendant may resort to other evidence, and prove them jointly partners in the transaction; he is not precluded from so doing. If this be so, it was indifferent to the witness which way the verdict went. If indeed it should turn out that he was a partner, the verdict in favour of this plaintiff would be rather prejudicial to him; for he would then be liable to contribution increased by the costs. In one way therefore the verdict would be indifferent, in the other prejudicial. It appears to me then that this was not a valid objection to the competency of *Lingus*. I have already stated the grounds upon which it appears to me that this action is maintainable. The bill of exchange was only the medium through which the money was received.

LE BLANC J. The verdict has been taken on the count for money had and received; therefore without considering whether the action might not be maintained on the special counts, the question is, whether it be maintainable on this count. Assuming that the evidence was all admissible, this appears to be money received by *Robinson* alone, and applied to his own use, and not to the use of his partners. The transaction was personally with *Robinson*, and not with his partners: it was money received in respect of a quantity of copperas, which copperas has not been delivered. Stating it simply in this way, there is no doubt that as the bargain was made under a personal contract with *Robinson*, and he has received the money, and the consideration for which the money was paid has failed, it

is money had and received by the person who received it to the use of the person who paid it. But an objection arises out of the mode or machinery which was used in this transaction. It appears that the contract for the delivery of the copperas was made by *Robinson*, in the name of himself and partners, and the mode of payment was by a bill drawn upon the plaintiffs by *Robinson*, in the partnership firm, which bill was afterwards paid. The money thus paid was received by the defendant, and this constitutes the ground of action for money had and received against him. The question is brought to this, whether the mode of conducting the business was such, as to preclude the plaintiffs from suing the defendant alone. If the case had stood upon the documents alone, the plaintiffs could not have proceeded against the defendant singly; because the transaction appears by the documents to be a joint one. But it also appears from the rest of the evidence, that the defendant took upon him to make a contract for himself as to the copperas, saying that if his partners disputed it he would be personally answerable. This he communicated to the broker, and through him the plaintiffs might well understand that it was an individual transaction with the defendant, and not with the consent of the partners, but as it appears against their consent. If therefore the plaintiffs had brought their action against all the partners, they would have incurred a very probable chance of being nonsuited upon proof that the contract was made with one partner alone. This being so, I do not see that the instruments by which the business of this contract was carried on can prevent the plaintiffs from following the money into the hands of the person who received it. And this brings us to the

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question, whether the evidence of *Angus* was admissible. Now the issue was, whether the contract was made with the defendant and two others jointly, or with the defendant alone. And for the purpose of shewing that the money paid on the bill came into the hands of *Robinson* alone, and not of the other partners, (for that, I take it, was the purpose for which the witness was called,) the plaintiffs called *Angus*. He proved that the partners had nothing to do with making the contract, or drawing the bill, and that they had not received the money. And though it be true that one partner may by his act bind all the rest, where third persons are concerned who have no knowledge of the partnership arrangements, yet as between themselves he shall not be able to do so, if they have agreed together that one other of the partners, and not he, shall have the control over the partnership property; and yet he in violation of this agreement does interfere with it. The same would follow where a stranger was concerned, if he had notice of the agreement, though it would be otherwise as to the world at large. Now here the testimony of *Angus*, who was called for the plaintiffs, in support of the action, certainly goes to prevent the plaintiffs from recovering against the partners; because this record would be evidence in an action brought against the partners by the plaintiffs, to shew that they had already recovered against one, on proving that it was the same transaction. But with respect to *Angus*, the defendant may now sue him in an action for contribution, and if he is able to show by other evidence than that which was produced on the present occasion that though the plaintiffs have recovered against him as upon a sole transaction, the transaction was nevertheless a joint one, he

he will be well entitled to maintain his action for contribution. In which case the recovery against him in the present action, so far from being a bar to an action against *Angus*, would be admissible in evidence against him to shew the amount of damages which the defendant has paid, and how far he (*Angus*) ought to contribute.

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BAYLEY J. I am entirely of the same opinion. When the defendant received the money as the price of the goods which he ought to have delivered, but did not deliver, he received so much money on a consideration which had failed; and the plaintiffs became entitled to recover either against the defendant or all the three partners. And which of these are liable is the question. The defendant alleges that his partners are jointly liable with him, and that the money was received by him for the joint benefit of them all. He relies on the bill of parcels, on the face of which the contract appears to be joint, and on the bill of exchange which is drawn by him in the partnership name. He insists that it was on the partnership account. Let us consider if it was so under all the circumstances. According to the testimony of one of the witnesses, the defendant determined to sell the copperas in order to procure the price of it into his own hands, and not with any view of benefiting the partnership. He obtains the bill of exchange, and does not deliver the copperas, and then he receives the money on the bill, and never accounts for it with his partners. If the money is to be refunded, ought it not to be refunded by him who has received it for his own benefit? Therefore this machinery of the bill of parcels, and of the bill of exchange, shall not be

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sufficient to convert this into a partnership transaction, seeing that the money was not received by the defendant on the partnership account. He meant indeed that it should be a partnership contract, provided the other partners would concur with him; but if they would not, he professed that he would deliver the goods as his own; therefore the money he received on this contract must be considered as received on his own account, and the count, as it seems to me, for money had and received is maintainable. Next we come to the question, whether *Angus* was a competent witness. I take the rule to be, that a witness is not incompetent unless he be interested in the event of the suit. He may be interested in different ways. If, for instance, the result of the suit will be to protect him from having a demand made against him, or to put him in a worse situation than before, he is an incompetent witness. But if he stands in this situation as to the event, that whether the suit terminates in one way or the other he will equally be liable, *stat indifferenter*, and there is no reason why he should not be a competent witness. Now in this case *Angus* would not perhaps have been a competent witness for the defendant, because he would have had an interest in defeating the suit. It would be singular therefore if he were also an incompetent witness for the plaintiffs, for then he must be interested both ways; and if he were interested both ways, it should seem that the one would balance the other, and he would stand indifferent. Take it as the case now is, that the plaintiffs have recovered a verdict against the defendant, for which purpose they called *Angus*, one consequence of this recovery will of course be to preclude them from recovering against *Angus*; but *Angus* will be liable to an action at the defendant's

defendant's suit for contribution; and therefore he stands indifferent, and was a competent witness. Take it on the other hand, that the plaintiffs had failed in their action against the defendant, they might then have sued all the three partners, and if they recovered against them, *Angus* would be liable either for the whole, or for part; and if he contributed more than his proportion, would in like manner be entitled to resort for contribution against his other partners. Therefore in either way *Angus* would be ultimately liable to pay his due proportion. It is surmised that the defendant could not call on him, because this verdict having proceeded upon the ground that the defendant is individually liable, he would be estopped by this record from saying that his partners are jointly liable. I confess this is the first instance in which I have heard it suggested that a party is estopped by a record as against another who is a stranger to it. As between parties or privies, the record would be an estoppel; but never can be, where they are strangers. It may be that the defendant in this suit may have failed to prove the promises joint, but if other evidence might be received in the action between him and his partners which would not have been receivable in this action, how absurd would it be to say that this record would operate as an estoppel. Now suppose a bill in equity to have been filed, or an action brought against the partners by the defendant, and that they in certain letters had admitted this to be a partnership transaction, on which they were jointly liable, those letters which would not have been evidence for the defendant in this action, would be evidence against the partners in such bill or action. For the above reasons it seems to me that *Angus* stood indifferent, or rather perhaps that his interest was the other way.

Rule discharged.

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In an action by a copyholder against the lord of a manor for a false return to a mandamus, in which mandamus a custom was set forth in respect of copyholds granted for two lives, that the surviving life should renew, *paying to the lord such fine as should be set by the homage, to be equal to two years improved value, and not guilty pleaded, depositions made in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, paying to the lord a reasonable fine to be set by the lord or his steward,* and which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the now copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves, that they were such, or were persons acquainted with the customs of the manor. And their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made *post litem motam*, because the same custom was not in controversy in the former suit as in the present.

CASE against the defendants as lord and steward of the manor of *Sheepshead* for a false return to a mandamus, which mandamus set forth a custom, in respect of copyholds granted for two lives, for the second-named life, in case of his or her surviving the first, to add another life in place of the first, and to surrender to the lord or his steward in court such copyhold, for the purpose of having a regrant thereof for his or her life, and such other life named, and for the lord or his steward to accept and regrant the same as above, such surviving life paying to the lord or his steward by way of fine on such regrant, *such sum of money as by the jury or homage of the said court might be assessed or ascertained to be equal to two years improved value of the tenement so surrendered and re-granted*; and the mandamus directed the defendants to hold a court, and accept from the plaintiff (being the second surviving life of two, and having named one *M. L.* in place of the first) a surrender, &c. and regrant, &c.; to which the defendants made a return, denying such custom, &c. Plea, not guilty.

At the trial before *Graham B.* at the last *Leicestershire* assizes, entries from the court rolls of renewals

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beginning in 1737 were read for the plaintiff in support of the custom, and parol evidence was also given by several tenants of the manor, some copyholders, and others freeholders, both of whom it appeared had been used to serve upon the jury. For the defendants other entries from the court rolls where the fines appeared to have been set by the steward, were read; and also an office copy of the proceedings upon a bill filed in the Exchequer in 4 *W. & M.* (1693), against Sir *Ambrose Phillipps*, then lord of the manor, by one *G. Bramley* and *R. B.* his son, (claiming under the surrender of one *R. Bramley* deceased, to the use of himself for life, and of *G. B.* and *R. B.* successively, for their lives,) to be admitted to a copyhold, upon a custom *for any copyhold tenant for life, or lives, to change his lives, or if any of his lives are dead, to fill up the copy by adding or naming one or two lives to the life in being, for which the copyhold tenant must pay to the lord a reasonable fine to be set by the lord or his steward.* The answer of Sir *A. P.* insisted that in all cases of renewal the fine is set by the lord, or his agent, at a price according to the life or lives then in being, or the life or lives to be changed or added. There was a final decree, stating, that an issue which had been directed by the Court had been tried, and a verdict upon full evidence on both sides given for the defendant, and dismissing the plaintiffs' bill. And the depositions in that suit made on behalf of the then plaintiffs, were tendered in evidence for the now defendants. It was not proved, farther than by what appeared from the record itself, that the parties litigant were really, as they claimed to be, lord and copyholder, or that the persons making the depositions were really such as they represented themselves to be in

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the depositions. One of them described himself as a copyholder, and who had served on the juries; another as under-bailiff of the manor; others as living in the manor, and being well acquainted with the usages and customs of the manor, and as having attended the courts as jurymen; and their depositions went in general to establish the custom as set up by the lord, that all fines were set by the steward and approved by the lord, according to the value of the lands and the lives. It was objected to the reading of these depositions that it did not appear that the suit was between the same parties, or privies, to the present action, and therefore it was *res inter alios acta*; 2dly, that they were not admissible as declarations, having been made *post litem motam*. The learned judge admitted them as evidence of reputation upon a question touching the custom of the manor. And there was a verdict for the defendants.

These grounds of objection to the admissibility of the evidence were renewed upon a rule nisi for a new trial in the last term; and in support of the latter ground the opinions of the judges in the Berkeley peerage case (a) were referred to.

Vaughan and *Copley*, Serjts., *Reader* and *Phillipps*, shewed cause (b), and they did not dispute that in general a judgment shall not be admitted in evidence unless it be between parties or privies thereto. Yet, they said, this rule was subject to exceptions; as on a question of custom or toll (c), liability to repair a highway (d), or pedigree (e), a verdict or judgment is evidence, though

(a) See 4 *Camph. N. P. C.* 401.

(b) Cause was shewn at *Serjeants' Inn* before this term.

(c) *City of London v. Clarke*, *Carth.* 181. *Cort v. Birkbeck*, *Doug.* 218.

(d) *Rex v. St. Pancras, Peake N. P. C.* 219. (e) *Bull. N. P.* 233.

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between other parties; for in such cases reputation would be evidence. So in this case reputation was admissible to disprove the custom, because the custom is in the nature of a public right; in like manner as upon a question of boundary between parishes or manors (*a*), or where the right is but a private right, yet partakes of something in common with a number of other persons (*b*), reputation is considered to be good evidence. Therefore as to the first objection it appears that this decree would have been of itself good evidence. But, 2dly, as the bill, answer, &c. and decree, were only offered as introductory of the depositions, and not as principal evidence, it is sufficient if the depositions were admissible. And as to that, the depositions were not offered in evidence, in their character of depositions, but as declarations; and if the declarations of deceased persons would have been admissible, surely it is as reasonable that their depositions should be received; a deposition being a more solemn declaration. And though the persons deposing were not proved to be copyholders, yet considering the great difficulty of proving such remote facts in the ordinary manner, such proof ought not reasonably to be expected; and the depositions do describe them either as such, or as persons acquainted with the customs of the manor. Nor is the objection to their admissibility as being made *post litem motam* well founded, because that rule is confined to a *lis mota* upon the very point (*c*); whereas the controversy in the former suit was upon a different custom from that which was agitated in the present action; the former

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(*a*) *Nichols v. Parker*, 14 East, 331. n.

(*b*) *Weeks v. Sparke*, ante, vol. i. 679.

(*c*) *Berkeley Peerage case*, 4 Camp. N. P. C. 401.

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being for a renewal upon a reasonable fine to be set by the lord or his steward, the present upon a fine of such sum as by the jury may be assessed to be equal to two years' value.

Denman and *N. Clarke* (with them *Clarke*) contra. The question being whether the depositions were admissible as hearsay, it was essential in the first place to shew that they were made by persons who had the means of knowledge; of which their own assertion cannot be sufficient evidence, but it should have been shewn by some extrinsic evidence that they were copyholders. For if they were strangers, they cannot be supposed to have known the fact, and their depositions are equally inadmissible either as declarations made by them against their interest, or as hearsay. So hearsay is not admissible on questions of pedigree, unless it be derived from some person that is shewn to have been a member of the family. Upon the other point, there is no such rule that the controversy must be on the very point, in order to exclude declarations made in the course of that controversy. The reason for excluding them after the commencement of a suit is, because they are likely to have been made under a bias or feeling of interest, which may be expected to have been excited by the suit; but if the suit involve the same general point, as if it concern the general right of renewal between the lord and the copyholders, what difference can it make as to the feelings of interest which are presumed to be likely to arise in the course of it, whether the right be claimed by the copyholder, or resisted by the lord, with more or less particularity? Still the controversy is concerning the right, which is the substantial point.

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LORD ELLENBOROUGH C. J. This is a case in which I own I have no doubt upon any part of it. The point is narrowed to the admissibility of the depositions. I confess that I have no doubt that the depositions were admissible in evidence. Considering them as made in a suit, which may now be said to be lost in remote antiquity, we should give this record but very little effect, if we did not attribute to it verity in many of the particular matters which it contains; such as that the parties litigant were clothed with the rights in which they profess to stand, and were agitating the claim put forward on the record. It appears, then, that in 1693 a copyholder of this manor, or a person at least claiming to be a copyholder, is engaged in a suit with the lord, and in the course of that suit produces persons, who appear to have stood *in pari jure* or *in eodem jure*, who make their depositions in support of the claim. These depositions I consider to be evidence, as being made by persons standing *in pari jure*; and so they have been considered in all times. The depositions furnish evidence not only against the parties making them, but against all persons who stand in the same relation. In the same manner in all cases of customs, such as the custom to grind at mills, as in the case of *Settle Mill* (a), and various other mills, depositions of this kind have ever been received. I have heard them read twenty or thirty times on the circuit which I used to go, without objection; and I remember particularly in the case of *Leeds mill*, that they were admitted, as the depositions of persons standing *in pari jure*. We find, then, that at the time

(a) See *Cott v. Birkbeck*, Doug. 219.

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when this suit was litigated, it was not doubted by the lord, or by the persons litigating with the lord, that he had a right, by himself or his steward, to set or assess the fine, without the intervention of any other persons, whose approbation was necessary as a qualification of the lord's right. And as no claim of this sort was set up at that time, it is evidence that no custom to warrant it could have existed at that time. I do not understand that it is denied that this evidence, if it were admissible, ought to have weight, but its admissibility is resisted upon the ground that it is hearsay evidence, and because it is not shewn that the persons from whom it is derived were connected with the subject-matter. I consider, however, that it is apparent from the evidence stated on this record, that the persons making these depositions must have been connected with the subject. As to the objection that these were declarations *post litem motam*, it does not appear that any one person from the commencement to the termination of the suit is found to assert or even speak any thing relating to the existence of such a custom as now claimed, so as to shew that it ever was in litigation. Indeed this part of the evidence is material, not so much on account of what the witnesses declare, as of what they omit to declare, shewing that no such qualification of the custom as now set up was at that time introduced or insisted on; which I think is strong and legitimate evidence. As to the other evidence, the entries upon the rolls, where the fines were set by the steward without any qualification, seem to be irresistible; and I see no reason on account of any supposed error in the admission of any part of this evidence, to send the case to a new trial.

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LE BLANC J. This rule was moved on the ground that improper evidence had been received at the trial. I do not find that it has been attempted to impugn the verdict as being a verdict contrary to the evidence. It becomes, then, simply a question whether this evidence was in point of law receivable. When we consider who the parties are, now litigant on this record, and what it is that they are litigating, and also who the parties were, that were litigant on the record in King *William's* time, I confess that I cannot persuade myself to doubt that this evidence was admissible. The present parties have rested their claim upon a custom which is applicable to all copyholders holding for two lives. It is alleged to be an immemorial custom within the manor that such copyholders have a right to renew in the manner there stated, paying to the lord a fine to be assessed by the jury, and not by the lord or his steward. In order to shew that no such custom exists, the court rolls only going back as far as the year 1737, the defendants shew a suit in the Exchequer in the time of King *William*, which appears on the face of the record to have been between a copyholder and the lord, the copyholder insisting upon an immemorial custom within the manor for a copyholder for lives to fill up the lives, paying to the lord a reasonable fine to be set by the lord or his steward, and the lord insisting that the fine ought to be set with relation to the lives then in being, or to be added. And the defendants now rely on this record, as shewing that at that time at least no such custom as the present was ever set up, but that the custom, which was applicable to all copyholders for lives, and therefore to copyholders for two lives, was, that the copyholder should renew on payment of a fine to be set by

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by the lord or his steward, without mentioning any thing of the intervention of the homage or jury; that is, that the intervention of the homage or jury was no ingredient in the custom. Now this appears to me to be material evidence as it regards this issue. It is objected however to its admissibility, that this is a matter which properly is to be regarded as *res inter alios acta*, that it is neither between the same parties as it regards the present suit, nor between parties who stand in the same situation with the present. But surely this appears, that the present suit is a suit between the lord and a copyholder for two lives, who sets up a custom applicable to copyholders for two lives, and that the former suit was between the lord and a copyholder for lives, who relied on a custom applicable to all copyholders for lives generally. But this gives rise to another objection, namely, that these depositions, taking them to be hearsay evidence, are not admissible, having been made *post litem motam*. One answer to the objection is this, that treating the depositions as hearsay evidence only, still they are not to be considered as made *post litem motam*, because the same thing is not in controversy now that was in controversy in the former suit; the two customs are different, which gave rise to the two suits. And the strong ground of observation which arises upon these depositions is not that they are evidence of any particular thing which the witnesses have affirmed, but that at a time when a dispute existed between the lord and his copyholder concerning the copyholder's right to renew, on some terms, it was never made a term that the fine should be assessed by the jury. I do not see how in this point of view it can be said that this was not evidence applicable to the issue; and it seems also

also to me to stand clear of objection, either on the ground of its being a declaration made after the commencement of a suit touching the matter in question, or because we ought to look for evidence *aliunde* to make it admissible.

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BAYLEY J. I have no doubt that this evidence was properly received. The plaintiff might have limited his claim to his own copyhold, but instead of that he makes common claim with other copyholds granted for two lives. By this he gains an advantage, viz. that he is entitled to go into the question of usage as it applies to all the like tenements within the manor; on the other hand he exposes his claim to be met by evidence relating to any other tenement within the manor, standing in the same situation as his own. Therefore this evidence seems to me not to be *res inter alios acta*, but *inter eosdem acta*; for as the plaintiff has made common claim with the rest of the copyholders, he must be content to stand upon the same footing as they do. It appears, then, that in 1693 a bill was filed by a copyholder against the lord: it is argued indeed, not by a copyholder for two lives, and that without this, what was done in that suit does not fall within the range of the present question. But it does appear by the bill that the complainant claimed as one of the surviving lives; and we must assume at this time of day that the bill was not a mere fabrication, but was really filed by such a copyholder against the lord, and that the trial was had and the depositions made between such parties as were really litigating their rights in the characters claimed and disclosed on the record. In that bill, then, *Bramley* made his claim as a surviving life in the copy, and no distinction

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distinction is made between copyholders for two or three lives, and he states the custom of the manor as general, upon which he founds his bill and prayer. The bill and prayer I consider to be an act done, and that the complainant in that suit is identified with the present plaintiff, as much as if the latter actually derived title by descent from him. And we find that the complainant states the custom to be that the copyhold tenant, upon renewal, must pay to the lord a reasonable fine, to be set by the lord or his steward, and that he was willing upon admittance to have paid such fine. The silence observed in the bill as to any interference of the homage in assessing the fine, was surely, upon the present trial, evidence to go to the jury, that by the custom, as it was understood at that period, the homage had not any right to interfere. Then follow the depositions; and these I do not look upon merely as the declarations of persons unconnected with the subject, but as the depositions of persons made by them in the character of witnesses brought forward by the copyholder, whose interest it was to put foremost such witnesses as were best able to depose to the matter in dispute. Why am I to assume that the copyholder brought forward witnesses, who were ignorant? And I do not agree with the plaintiff's counsel that it was necessary to prove the witnesses to have been copyholders in order to let in their testimony. The plaintiff's witnesses at the last trial do not all appear to be copyholders, yet as they were present at the holding of the courts, and therefore knew what passed, they were competent to speak to that. So in the former suit, I cannot infer that they were incompetent to have a knowledge of the facts they deposed to, on the contrary it is to be presumed they had a competent

tent knowledge, being brought forward as witnesses by a copyholder. This way of viewing the case seems to me to avoid all objection to the depositions as being made *post litem motam*, but if it were necessary to go into that question, I think the distinction has been correctly taken, that where the *lis mota* was on the very point the declarations of persons would not be evidence; because you cannot be sure that in admitting the depositions of witnesses selected and brought forward on a particular side of the question, who embark to a certain degree with the feelings and prejudices belonging to that particular side, you are drawing evidence from perfectly unpolluted sources. But where the point in controversy is foreign to that which was before controverted, there never has been a *lis mota*, and consequently the objection does not apply. It seems to me that for these reasons the evidence was properly admitted, and that this rule ought to be discharged.

Rule discharged.

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WILLIAMS *against* WILLIAMS.

Tuesday,
Jan. 23d.

IN trespass quare clausum fregit, and not guilty (a), the question at the trial before *Dallas J.*, at the last *Salop assizes*, was, whether the *locus in quo* was in the county of *Montgomery* or *Merioneth*, the plaintiff alleging that it was in *Montgomery*, the defendant in *Merioneth*.

In trespass *quare clausum fregit* and not guilty, the issue at the trial being in which of two counties the *loc. in quo* was situate, an exemplification of the depositions

taken in an ancient suit to perpetuate testimony, to which plaintiff and defendant were privies, was held to be admissible evidence at the trial, though it appeared that the interrogatories upon which the depositions were framed were leading interrogatories, such as would not have been allowed to be put at the trial.

(a) There were special pleas, but the jury were discharged of them.

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After a great deal of parol evidence on both sides, the defendant produced an exemplification of a record in the time of the Protectorate, (dated 1st *August* 1656,) of the proceedings in a suit in Chancery to perpetuate testimony, to which suit the plaintiff and defendant were respectively privies. The record consisted of the bill filed *Nov.* 1655, the answer, and depositions. And it was proposed to read several of these depositions on behalf of the defendant; to which it was objected, that they were inadmissible, inasmuch as the interrogatories to which they were answers, were leading interrogatories; and to make good this objection the interrogatories were read to the Court. (a) The learned Judge had

(a) 2d Interrogatory. Do you know two parcels of open and uninclosed lands and grounds, called and known by the names of *Gwaenhabod Corog*, and *Moelgameddbowel*, and do you know a stone placed and set on the lower end of the said *Moelgameddbowel*, southward, commonly called and known in the *Welsh* tongue by the name of *Careg Derfyn*, which signifieth in the *English* tongue the *Meer-stone*; and how long have you known those parcels of lands and grounds and the same stone, and was that stone, during the time of your knowledge thereof, taken and reputed to be a stone anciently there set and placed for a meer and division between the counties of *Merioneth* and *Montgomery* there adjoining one upon another; and has that part of *Moelgameddbowel* as lieth north and south-westward of that stone called *Careg Derfyn*, or *Meer-stone*, and the same *Gwaenhabod Corog*, during the time of your said knowledge thereof, been taken and reputed to be part and parcel of the said county of *Merioneth*, and to be situate, lying, and being in the township of *Rhiwaedog* in the parish of *Llanwair* and *Llangower*, or in either of them, in the said county of *Merioneth*, and to be the freehold lands and inheritance of the plaintiff, and of the said deceased and his ancestors?

4th, Have you known or seen an old dairy or summer-house, commonly called and known by the name of *Hafotty*, standing and being upon part and parcel of that parcel of land called *Gwaenhabod Corog*, in the place and site of the now *Hafotty* or summer-house lately erected and made thereon by the plaintiff and his servants and agents, and which now standeth on the same, if you have seen and known that old dairy or summer-house, shew and declare upon your oath how long agoe it is since you have seen and known the same, and who

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had no doubt of the interrogatories being leading, but he doubted whether upon that account he ought to reject the reading of the depositions; he therefore admitted them, reserving the point. And upon their being read, the counsel for the plaintiff agreed that they could not resist the effect of them; so a verdict passed for the defendant.

In the last term a rule nisi was obtained for a new trial, upon the question whether these depositions were properly received in evidence, the interrogatories being leading, and it was said that this was the first opportunity which the party had of objecting to them.

Dauncey, Peake, and W. E. Taunton, who shewed cause (a), denied that this was the first opportunity which the party had of objecting to the depositions. For in a suit to perpetuate testimony, which this was, the party may by the practice of the Court move to suppress the depositions, if the interrogatories are leading. The practice seems to be this; after the witnesses are examined, a rule for publication is obtained, of which the adverse party must have notice, and a day is given him to shew cause why publication should not pass; and publication may be stayed upon reasonable cause; or after office copies of the depositions are ob-

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was taken and reputed to be the owner thereof at the time of your knowledge thereof, and did continue reputed owners thereof during all the time that you knew the same; and have you known and seen the same old house there erected, and was there not then at the time of the erection thereof a hearth with some wall and stones visible and apparent to be seen in the said place where the same old house was erected, which did signify and make manifest that there stood formerly a house there?

(a) Cause was shewn at *Serjeants Inn* before this term.

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tained, the party may move to suppress them, because the interrogatories are leading, and the Court will refer them to the Master, and if he reports the interrogatories to be leading, will order them to be suppressed. *Hinde's Chanc. Pract.* 387. 394. *Gilb. Chanc.* 148. See also *Proceedings in the High Court of Chancery*, 24., for the order of Sir N. Bacon, Dec. 10. 3 *Elix.* regulating the examination of witnesses *in perpetuam rei memoriam*, and the orders to be observed before granting of publication. Also, orders and rules in the Exchequer, *Rule* 34. Order of Lord Chancellor, 3 *Jac.* 2. *Spence v. Allen*, *Chan. Prec.* 473. *pl.* 307. *Gilb. Eq. Cas.* 150. *Eq. Cas. Abr.* 232. *pl.* 3. *Vin. Abr. Evidence. P. a.* 2. *pl.* 11. *Lord Arundel v. Pitt*, *Ambl.* 585. But after publication has passed, and the plaintiff has exemplified the depositions, it is too late to object that the interrogatories are leading; in the same manner as if depositions taken *de bene esse* are irregular, yet at the hearing of the cause it is too late to make the objection for irregularity, but in such case you ought to have moved the Court to discharge the order for publication. (a) And if this objection could now prevail, it would be remediless; for where it is made in due season, the Court may order fresh interrogatories to be put in for the witness's examination over again, but this cannot be done after the witnesses must necessarily be all extinct through lapse of time. Also the examinations of witnesses in ancient times to perpetuate testimony, would be to no purpose, if the reading of them might be opposed on this ground; for anciently the rules for examination were not so strict as modern practice requires,

(a) *Dean and Chapter of Ely v. Warren*, 2 *Atk.* 189.

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and most of them would be open to this objection. Besides, it is but an irregularity in the form of the question, and it is a general rule that all objections on the ground of irregularity must be made in the first instance, otherwise they are too late. And it was never yet heard of, that because the Judge at the trial permitted leading questions to be put, therefore the adverse party is entitled to a new trial.

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Abbott, Puller, and Campbell contra, allowed, upon looking to the authorities, that there had been an opportunity of objecting to the depositions before this. Yet they insisted that it was not too late now to make the objection, because at no time is a party allowed to put leading questions upon the very point in issue, which these interrogatories appear to be, and the answers to them are in the words of the interrogatory. And if the Judge at the trial must have disallowed them if put *viva voce*, it is a strange thing to say that now he shall be bound to admit what never was properly evidence, because at the time it was received, the adverse party did not point out that it was improper; as if it were not the office of the party who seeks to perpetuate the evidence, rather than of him against whom it is prayed, to be careful that it is lawfully and formally made. These bills to examine *in perpetuam rei memoriam*, were utterly disapproved of by the Lord Chancellor *Egerton*, and the reason given is because the depositions are not to be published until after the witnesses are dead (*b*); which is an answer to the argument, that if objection had been made at first, the witnesses might have been examined

(a) *Harrison's Pract.* 53.

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over again. And in one case it appears that the depositions of a witness who was examined *in perpetuum rei memoriam* were suppressed after his death, because the plaintiff had been suffered *to instruct him* (a); and this is a parallel case, for what is the putting of leading interrogatories but a species of instruction? Depositions such as these which are not records, nor have the authority of things adjudged, are open at all times to just exceptions. Therefore at the hearing of a cause in Chancery the evidence of one having an interest cannot be read (b), and so a party may object to a deposition that it is not properly sworn (c); which shews that notwithstanding he might before have moved to suppress the evidence, it is not too late afterwards to object to it. And if this may be done at the hearing of a cause in equity, surely it may be done on the trial at law. The true criterion seems to be, that if the question would not have been allowed to be put at the trial, the Judge ought to reject it though it be in the form of a deposition; and such is the constant practice as it regards depositions taken in the cause before the court.

LORD ELLENBOROUGH C. J. There is a plain difference betwixt depositions such as these, and depositions taken in a cause then pending in court; for in the present case the party had an opportunity of objecting to them, and might have applied to have them expunged, instead of which he has allowed publication to pass, and the evidence to be exemplified; in the other case he has not any opportunity, but comes with his objection fresh

(a) *Harrison's Pract.* 278.(b) *Com. Dig. Chancery*, T. 4.(c) 1 *Atk.* 21. *Omychund v. Barker.*

at the trial. It is observable that the cases put of objections made at the hearing, are either where the witness would have been incompetent on account of interest, or where the deposition would have been a nullity, on account of its not having been sworn.

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BAYLEY J. Though it may be true that ordinarily publication does not pass in a suit to perpetuate testimony, in the lifetime of the witnesses, yet it sometimes does; and in this suit one is led to conjecture that this was the case; for the exemplification which must have been preceded by publication takes place the very next year after the bill filed.

Per Curiam,

Rule discharged.

M'DOUGLE *against* The ROYAL EXCHANGE
Assurance Company.

Wednesday,
Jan. 24th.

DEBT on a policy of assurance upon a cargo of oats on board the ship *Beaver*, at and from *Barnstable* to *London*, and the plaintiff claimed as for a particular loss exceeding 5*l.* per cent., it being agreed by the policy that in case of particular average occasioned by the ship being stranded, to pay so much thereof as should exceed 5 per cent. Upon *nil debet*, the case at the trial before Lord *Ellenborough* C. J. was thus:

The striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends, was held not to constitute a *stranding* within the meaning of that term in a policy of assurance.

The ship in coming out of *New Grimsby*, where she had been driven by stress of weather, with a pilot on board, struck upon a rock, about the distance of a cable and a half's length from the shore, and remained upon the rock a minute and a half. The captain swore that

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the ship was laid upon her beam ends when she was upon the rock. And the question was, whether the particular loss occasioned by this accident was a loss occasioned by the stranding of the ship. His Lordship ruled that a stranding imported some degree of continuance on the shore, and not merely, as it was commonly termed, to touch and go; and the plaintiff was nonsuited. (a)

Scarlett now moved for a new trial, and referred to *Dobson v. Bolton* (b), and argued that this appeared to be such a striking on the rock as constituted a stranding. For if it be a mere "touch and go," that is, a scraping of the ship's bottom so as to impede her velocity without actually stopping her course, this will not amount to a stranding; but here was an actual stoppage of the ship in her course, and though it was but for a minute and a half, yet the period of time does not determine whether a stranding or not; and great uncertainty would follow if it did; for then it might be asked, what portion of time shall be sufficient, shall it be half or a quarter of an hour? Therefore to avoid such uncertainty, the stranding of the ship is to be determined by whether she be actually stopt or not, without regard to the time for which she is stopt.

LORD ELLENBOROUGH C. J. The evidence was, that the ship in coming out of harbour struck on a rock, where she remained a minute and a half, to the best of the captain's judgment. If this constitutes a stranding, it will come to this, that an instantaneous stoppage of

(a) See 4 Campb. N. P. C. 283. 1 Stark. N. P. C. 130.

(b) Park. Insur. 177. 7th edit.

the ship's progress must be a stranding, the most minute portion of time that division is capable of will be enough. But I take it that stranding in its fair legal sense implies a settling of the ship; some resting, or interruption of the voyage, so that the ship may *pro tempore* be considered as wrecked; from which misfortunes a vast deal of damage does frequently occur. I really thought at the trial that there was more waste of time than such an inquiry needed.

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LE BLANC J. There must be some settlement of the ship on the rock or piles, or whatever the place may be, to constitute a stranding.

BAYLEY J. According to the argument, if a ship in coming up a river should happen to ground but for a minute, though this does not make it necessary for her to shift a single sail, it will be a stranding, and the ordinary exception in policies of assurance will be gone.

Rule refused. (a)

(a) See *Herman v. Paux*, 3 Campb. N. P. C. 429. *Baring v. Henkle* Marsh Insur. 240.

EXON *against* RUSSELL.

Wednesday,
Jan. 24th.

[N assumpsit by the indorsee against the maker of a promissory note, the plaintiff declared that the defendant made his promissory note, and thereby pro-

Where the indorsee declared against the maker of a promissory note, that he made the same payable at

the house of Messrs. B. and Co., London, and upon production of the note at the trial it appeared that the address at the house of Messrs. B. and Co. was not a part of the note, but only a memorandum at the foot of the note: Held that this was a variance.

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mised to pay, &c., *and made the same payable and to be paid according to the tenor and effect at the house of certain persons described as Messrs. Brown, Cobb, and Co., Bankers, London*; and the plaintiff did not aver any presentment at the house of *Brown and Co.* There were the money counts. Plea, non assumpsit; and at the trial before Lord *Ellenborough* C. J. at the *Middlesex* sittings after *Trinity* term, the note was produced, and was in this form:

£100.

London, 11 Nov. 1814.

Six weeks after date I promise to pay *George Brown*, or order, 100*l.* for value received.

Jos^a Russell.

At Messrs. *Brown, Cobb, and Co.* Bankers,
London.

There was no proof of any presentment at the house of *Brown and Co.*, and for want of this it was objected that the plaintiff was not entitled to recover. To which it was answered, that the place of address not being inserted in the body of the note, formed no part of the contract, wherefore proof of presentment at the place was unnecessary. His Lordship allowed the plaintiff to take a verdict, reserving to the defendant to move upon this point. Accordingly a rule nisi for a nonsuit was obtained in the last term.

And upon cause shewn on this day by *Comyn* for the plaintiff and *Lawes* for the defendant, the Court, after hearing the cases (a), intimated an opinion that the address at the foot of this promissory note was to be

(a) The cases cited in argument were *Saunderson v. Judge*, 2 H. Bl. 509. *Price v. Mitchell*, 4 Campb. N. P. C. 200. *Fenton v. Gaudry*, 13 East, 459. *Saunderson v. Bowes*, 14 East, 500. *Bowes v. Howe*, 5 Taunt. 30.

considered only as a memorandum, and not as a part of the instrument itself; whence it followed that a special presentment was unnecessary. But then this difficulty to the plaintiff's recovering suggested itself, that the plaintiff has misdescribed the note in his declaration, for he has declared upon it as a note payable at a particular place, making this a part of the description of the note, which it is not, being only a memorandum. And there is no other count upon which the plaintiff can recover, for being an indorsee the money counts will not help him. It was answered that this was surplusage, being no part of the contract, and might be rejected.

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LORD ELLENBOROUGH C. J. The plaintiff has taken upon himself to aver that such is the import of the note; he has therefore not truly stated the note, for he has stated that it is made payable at a particular place. Therefore he ought to have been nonsuited upon the ground that he has misdescribed the note as payable at a particular place, which it is not, the address being no part of the contract, but a memorandum.

BAYLEY J. The plaintiff takes on him to aver it to be part of the note that it is made payable at a particular place. It is a misdescription of the instrument declared upon.

Per Curiam,

Rule absolute.

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Monday,
Jan. 29th.

The KING *against* WADLEY.

An indictment found at the Quarter Sessions upon stat. 52 G. 3. c. 155. s. 12. for disturbing a religious assembly, may be removed into this court by *certiorari* before trial.

AN indictment framed on stat. 52 G. 3. c. 155. s. 12. for disturbing a religious assembly, was found against the defendant at the *Gloucestershire* quarter sessions, and removed by the prosecutors into this court. The indictment charged, that the defendant on the 23d of *November*, 55th G. 3., with force and arms, at the parish of *Newnham* in the county of *Gloucester*, did wilfully, maliciously, and contemptuously disquiet and disturb a certain meeting, assembly, and congregation of persons assembled for religious worship, the same then and there being a meeting, assembly, and congregation permitted and authorized by a certain act of parliament made and passed in the 52d of the king, intituled, “An act to repeal certain acts, and amend other acts relating to religious worship and assemblies, and persons teaching or preaching therein;” that is to say, by then and there shouting, groaning, hallooing, talking aloud, throwing stones, bricks, and dirt, and making a great noise and disturbance, against the form of the statute, &c. The 2d count alleged it to be a certain meeting, &c. of persons assembled for religious worship, the same being then and there a meeting, &c. permitted and authorized by the statute in such case provided, to wit, a meeting, &c. of persons assembled for religious worship in a certain meeting-house situate, &c., which said meeting-house had been duly certified and registered pursuant to the statute in such case provided, against the form of the statute, &c. The defendant pleaded not guilty, and it was found

against him at the last *Gloucestershire* assizes, and in the last term was moved in arrest of judgment,

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That the Court had not any jurisdiction to try this indictment; for by 52 G. 3. c. 155. s. 12., upon which this indictment is framed, the offender upon proof before any justice of the peace by two or more credible witnesses shall find sureties to answer for such offence, and in default of such sureties shall be committed till the next general or quarter sessions, and upon conviction of the said offence at the said general or quarter sessions shall suffer the penalty of 40*l.* So that a conviction and consequently a trial at the sessions must, as it seems, precede a forfeiture, for the forfeiture is to follow upon a conviction at the sessions, and without such conviction there can be no forfeiture. And this was moved in order to question the propriety of the decision in *Rex v. Hube* (a), which was admitted to be an adverse decision upon a clause in the Toleration act (b) similar to the present clause.

Abbott and *Campbell*, who now shewed cause, admitting that this was an indictment for a new offence created by statute, argued that the rule was well laid down, that "where a new offence is created and directed to be tried in an inferior court, established according to the course of the common law, such inferior court tries the offence as a common law court, subject to be removed by writs of error, *habeas corpus*, *certiorari*, and to all the consequences of common law proceedings. In which case this Court cannot be ousted of its jurisdiction without express negative words." (c) And there

(a) 5 T.R. 542.

(b) 1 W. & M. c. 18.

(c) *Hartley v Hooker*, Cowp. 524. per *Ld. Mansfield*.

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are no negative words in the statute now before the Court. So if a statute direct that certain offences shall be inquired of only in the sessions of the peace, assizes, or leets, within the county where committed, *et non alibi extra comitat.*, yet may they be inquired of in the superior courts; for the statute is not in the negative, "and not in any other court," but "not in any other county." (a) Thus also it was resolved upon the statute 21 Jac. concerning penal laws, that if a penal law give authority to justices of peace, justices of assize, or oyer and terminer, to hear and determine an offence against the statute, without more, that means by indictment, and not by information, bill, or plaint. And though there be a special clause to sue by bill, plaint, or information, yet if one be indicted before the justices of assize, oyer and terminer, or of the peace, the indictment may be removed into this court, and tried here, or may be sent into the country to be tried at *nisi prius* (b). So if a statute gives a power of distress, and that if any question arise about taking it, the same shall be heard and *finally* determined by one or more justices of the peace (c); or if a statute directs an appeal to the quarter sessions, and that such appeal shall be final, and that no other court shall interpose (d), yet a *certiorari* lies in both these cases. Upon these principles *Rex v. Hube* was determined, and the court said that they did not entertain any doubt upon this point.

Jervis and *W. E. Taunton* contra, said, that the principal point before the Court in *Rex v. Hube*, was as to

(a) *Shoyle v. Taylor*, Cro. J. 178.

(b) 2d & 3d Resolutions, *W. Jones*, 193.

(c) *Rex v. Plowright*, 3 Mod. 94.

(d) *Rex v. Reeve*, 1 Bl. R. 231. 2 Burr. 1040.

the manner of levying the penalty; and though the Court also held that the indictment was properly removed from the quarter sessions, it does not appear that they gave any reason for it. And if this Court may withdraw from the justices at sessions, to whom it is specially given, the trial of this new offence, as well may it take cognizance of the offence *ab origine*, and withdraw it from the sessions altogether; yet this would be doing violence to the language of the statute, and overruling what Lord *Mansfield* has denominated the clearest distinction. For “if,” says he, “a new offence is created by statute, and a special jurisdiction out of the course of the common law is prescribed, it must be followed. If not strictly pursued, all is a nullity and *coram non judice*. In that case there is no occasion to oust the common law courts, because not being an offence at common law, but punishable only *sub modo*, in the particular manner described, they never could have jurisdiction.” (a) Now that this is a new offence created by the statute, and not an offence at common law, cannot well be doubted, for it is neither a riot, nor an affray, being committed by one person only; neither is it an assault, there being no attack upon the person of another: it is therefore an offence only against the statute, which prohibits the disturbance of such an assembly as by the statute is made lawful. It is also plain that the jurisdiction prescribed is out of the course of the common law, from these considerations, viz. that the statute requires proof to be made by two witnesses before the offender can be committed; also that the offender may be proceeded against by information before

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(a) *Cowp.* 524.

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two justices, according to the provisions of sect. 15., for that section includes all persons guilty of an offence for which any penalty is imposed, in respect of which no special provision is made; and there is no appropriation of the penalty in this case; also that by the same sect. all penalties may be levied by distress under the hands and seals of two justices. Wherefore in one case, because the statutes gave the justices power to mitigate the penalties, this was held sufficient to oust the superior courts of jurisdiction. (a) And this principle, that where an act makes a new offence, and prescribes a particular method of proceeding, the common law method is done away, is as old as the time of *Jac. 1.* (b), and has been acted upon from that time to the present in many subsequent cases (c); which cases greatly outweigh the resolutions upon the statute 21 *Jac.* cited *contra*. And *Shoyle v. Taylor* was not like this a question of jurisdiction, but only of venue. As to all the other cases cited *contra*, the obvious answer to them is, that it does not follow because the *certiorari* is not taken away altogether, that it may not be partially taken away, that is, before trial.

LORD ELLENBOROUGH C.J. I own that when this question was first discussed upon the rule nisi, I certainly was struck with the sentence in the act of parliament, which enacts that the offender *upon conviction of the said offence at the general or quarter sessions shall suffer the penalty of 40l.*, so as to regard it as somewhat in the nature of a condition precedent, that there should

(a) *Gates v. Knight*, 3 T. R. 442.(b) *Castle's case*, Cro. J. 644.(c) *Rex v. Wright*, 1 Burr. 543. *Rex v. Robinson*, 2 Burr. 799.

be a conviction at the sessions in order to induce a forfeiture. But after considering the decision in *Rex v. Hube*, where a different doctrine was maintained, and also adverting to the rule laid down by Lord *Mansfield* in *Hartley v. Hooker*, that where an inferior court, established according to the course of the common law, is prescribed for the trial of a new offence, it tries the offence as a common law court, subject to all the consequences of common law proceedings; so that this court is, as it were, in privity with the inferior court, and may remove the proceedings by *certiorari*; I cannot but think that a larger rule is to be applied to this case than what at first struck my mind upon reading the sentence in the act of parliament. This rule will by no means interfere with any of those cases in which a new offence is created by act of parliament, and a tribunal out of the course of the common law is appointed to visit it; for this is not the case here; since the court of quarter sessions proceeds according to the common law, and the statute does not require two witnesses to prove the offence at the trial, but only to warrant the justice in binding over or committing the offender for trial. In all these cases the jurisdiction of this court is not taken away unless there be express words to take it away. In conformity with the rule, as it is expounded by Lord *Mansfield* in *Hartley v. Hooker*, and with the decision of *Rex v. Hube*, which is a decision in point, I think this *certiorari* was well issued.

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LE BLANC J. Unless the defendant could succeed in shewing that if the proceedings had been before the quarter sessions they could not have been sustained, the argument, as it seems to me, is at end; because

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if an indictment lies to the quarter sessions, it follows from the rule laid down in *Hartley v. Hooker*, and acted upon in *Rex v. Hube* on an occasion not distinguishable from the present, that the *certiorari* is not taken away. For admitting this to be a new offence created by the statute, still the court which is prescribed to take cognizance of it is a court proceeding according to the course of the common law; whence it follows, that the common law consequences attach upon it; one of which is, that the indictment may be removed by *certiorari* into this court. And this is the known distinction between offences made cognizable as this is, and such as are only cognizable by a jurisdiction which does not proceed according to the course of the common law. Now it seems not to be denied, that an indictment lies in this case to the quarter sessions, for otherwise it must be by summary proceeding; therefore, as it seems to me, it follows that this indictment might be removed.

Per Curiam,

Rule discharged.

The defendant was brought up on a subsequent day, and judgment given against him for 40*l.* penalty, and he was committed until the fine should be paid.

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The KING *against* JOHNSON.Wednesday,
Jan. 31st.

INDICTMENT against the defendant as treasurer of the county of *Lancaster* for refusing to obey an order made by the justices of the borough of *Liverpool*, at their general quarter sessions for the said borough: and the indictment alleged that the justices duly made the order, and set forth the same, viz. "That the said treasurer do pay to *W. S. H.* 6*l.* 2*s.* 10*d.*, which is considered by the court to be reasonable, and not exceeding the expences which it appears the said *W. S. H.* has been bona fide put to in carrying on a prosecution against *A. H.* for a felony committed upon the said *W. S. H.* within the said borough."

Signed "*W. Statham*, clerk of the peace in and for the said borough."

And the indictment averred that the order was made out by the clerk of the peace for the said borough, he being directed by the said court to make it out according to the statute, of which order the defendant had sight and was required by the prosecutor to pay. And it farther averred that long before and at the time of making the said order, and from thence hitherto, the town of *Liverpool* hath been and still is a town corporate, and that the inhabitants of the said town were during all the time aforesaid, and have been, and still are, contributory to the county rates raised in and for and within the county of *Lancaster*, &c., and concluded that the defendant refused to pay, &c., against the form of the statute, &c. 2d Count, omitting the averment that the order was made out by the clerk of the peace, &c. Plea, not guilty. At the trial before *Bayley J.* at

The costs of a prosecution, in the borough court of *Liverpool*, for a felony committed within the borough, may be ordered by the Court to be paid by the treasurer of the county of *Lancaster*, the borough of *Liverpool* not having exclusive jurisdiction, nor any treasurer like a county treasurer, nor any rate in the nature of a county rate, but contributing as a part of the county to the county rate.

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the last *Lancashire* assizes, there was a verdict for the crown, subject to the opinion of the Court upon the following case :

The defendant is treasurer of the county of *Lancaster*, and the justices at their general quarter sessions for the borough of *Liverpool*, upon prayer of the prosecutor, directed the order set forth in the indictment to be made out by *Statham*, which was accordingly made out by him, and the defendant afterwards had sight of it, and was requested to pay the prosecutor the sum mentioned therein, but he refused to obey the order. *Statham* was town clerk of the borough, having been appointed such by the common council in 1814, under the authority of a charter of 7 *W. 3.*, which is the governing charter of the borough; and by the resolutions of the common council at the time of his appointment, it was declared (amongst other things) that his duty should be to act as clerk of the peace of the borough at the several licensing and quarter sessions. Ever since his appointment he has acted as such clerk of the peace at the several quarter sessions holden for the borough, and he succeeded his father in the office of town clerk, who for nineteen years acted as clerk of the peace of the borough at the several quarter sessions holden therein. The town of *Liverpool* is a town corporate situate within the county of *Lancaster*, and before the year 1699 the township of *Liverpool* was a hamlet, and part of the parish of *Walton-on-the-Hill*, and was separated from it and made a distinct parish by an act of parliament in that year, (10 *W. 3.*) At the time of this separation the parish of *Walton* contributed towards the county rate 9s. in every rate of one hundred pounds, in three divisions, each of the divisions paying 3s., and the township of *Liverpool* contributing two-thirds,

thirds of the amount payable by one of those divisions, i. e. 2s., which sum it has ever since in like manner contributed to the county rate. (a) The parish and borough of *Liverpool* are co-extensive, and the inhabitants of the parish contribute to the county rate in respect of their property lying within the parish, and the corporation of *Liverpool* also contribute in respect of their corporate estate lying within the parish. There never was any separate rate, in the nature of a county rate, upon the corporation by name, or upon the township, made or raised in and for *Liverpool*. The corporation treasurer always paid the above rate until the year 1808, when he refused, and since that time it has been paid by the parish officers out of the poor's rate, the corporation contributing not by name, but as a part of the parish of *Liverpool*, in the same manner as any other private estate. The justices of the borough have not an exclusive jurisdiction within the borough, nor have they, or those who made this order, any jurisdiction without the limits of the borough in the county at large. The coroners acting in and for the borough, who are not coroners for the county at large, upon all inquests of death arising within the borough, have always been paid their fees out of the county rate by the county treasurer, and the expences of carrying prisoners, committed by the borough or county magistrates for offences done within the town of *Liverpool*, from the town to the county gaol, and also to the county house of correction, for trial at the assizes and county sessions, have always been paid by the county treasurer. The costs

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(a) It was stated, however, upon the argument, that since the new county rate act, *Liverpool* was assessed in the new rate made under that act, according to its due proportion.

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of all prosecutions at the assizes at *Lancaster*, upon commitments by the borough magistrates to the county gaol for felonies committed within the town of *Liverpool*, have always been defrayed by the county at large, in pursuance of orders made for that purpose by the Judges at the assizes upon the county treasurer, which orders have always been complied with. There has been immemorially a gaol within the borough, and about 1776 a house of correction was built at the expence of the corporation and parish, out of their estates and funds. The expence of supporting the gaol has been defrayed by an officer of the corporation, called a treasurer, out of their funds, but the expence of supporting the house of correction has been defrayed by the parish out of the poor rates from the time of its erection, until 1811, when the parish discontinued to support the same, and the building has never since been used as a house of correction, but has been and is now used as a lunatic asylum for parish paupers. Courts of quarter sessions have been immemorially holden within the borough, at which prisoners charged with petit larceny, and other offences, have been tried; a great majority of which prisoners have upon conviction been committed to the borough gaol, and some to the house of correction for the county of *Lancaster*, until 1809, since which time the right to commit to the said house of correction has been disputed. Persons charged as above have also before trial at the borough sessions been committed to the borough gaol; and the first instance of any commitment from the borough for trial at the county quarter sessions was in 1812. The ordinary expences of trials within the borough were from time to time defrayed, in certain proportions, by the treasurer out of the

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the funds of the corporation, and by the parish officers out of the poor rates. The duty of the said treasurer is to superintend the management of the estates and funds of the corporation. There are no public bridges within the borough which the inhabitants are liable to repair. The expences mentioned in the order were reasonable, and conformable to certain rules and regulations made by the justices of the borough under the proviso contained in stat. 18 G. 3. c. 19. s. 9.

The question for the opinion of the Court is, whether the defendant was bound to obey the order; if he was, the verdict to stand; if not, a verdict of not guilty to be entered.

This case was argued by *J. Clark* for the crown, and *J. Williams* for the defendant. The substance of the argument was this. For the crown, it was argued that the borough justices had power to allow the expences of prosecutions in the borough court for felony committed within the borough, and that they had well executed that power by making the order in question upon the county treasurer. As to their power, the stat. 25 G. 2. c. 36. s. 11. for the allowance of the expences to the prosecutor after conviction; 27 G. 2. c. 3. s. 3. for the allowance of the same to witnesses; and 18 G. 3. c. 19. s. 7. for the allowance of the same as well after acquittal as conviction, were relied on. And these statutes were all said to be *in pari materia* (a), and were therefore to be construed together; and that the language of them was general, extending to all courts in which felonies are tried. And it is remarkable

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(a) Per Lord *Kenyon*, 6 T. R. 241.

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that s. 9. of the last statute empowers the justices in sessions for any town corporate to lay down and alter rules concerning the allowance of such expences, which after being approved by a judge of assize are to be binding on all persons; whence this question naturally arises, if the justices for a town corporate have no power to allow these expences, why are they empowered to lay down rules concerning their allowance, and what becomes of the enactment that these rules shall be binding on all persons? Then, if they had the power, this power is well executed by making an order upon the county treasurer; for otherwise all the orders made by the Judges at the assizes on the county treasurer, for payment of the expences of prosecutions for felonies committed within the borough, would not have been well made (a); and yet it appears that the expences of such prosecutions have always been defrayed by the county in pursuance of such orders. If indeed this were the case of a borough which had a distinct treasurer in the nature of a county treasurer, and raised its own rate similar to a county rate, and had not been contributory to the county rate, and had an exclusive jurisdiction, this order on the county treasurer, it may be admitted, would have been ill (b); but the contrary of all these facts is stated to be the case; wherefore this borough is, for this purpose at least, like any other part of the county, neither could a separate rate have been assessed upon its inhabitants. (c) The order therefore was well made on the county treasurer.

(a) *Rex v. Myers*, 6 T.R. 237.(b) *Ibid.*(c) *James v. Green*, 6 T.R. 228. *Weatherhead v. Drewry*, 11 East, 168.
Bates v. Winstanley, ante, p. 429.

For

For the defendant it was argued, that the jurisdiction of the borough justices was confined to the limits of the borough, and that however large the words of the several statutes referred to might be, to authorize the justices in cases like the present to allow the expences, they could not do it by making an order on the county treasurer, whose office has no relation to the borough, and is entirely independent of the borough justices, his appointment being solely with the justices of the county. (a) The better construction therefore of these statutes seems to be, that without confounding jurisdictions, they empower the justices of the several districts mentioned in them to make orders upon the respective officers of those districts, over whom they have respectively a control; as justices of the county upon the county treasurer, and justices of lesser districts upon the officers of those districts. And so it appeared to Lord *Kenyon*; for he held, upon the construction of 18 G. 3., and on the other acts, that the word, *division*, applied to all such places as are mentioned in 27 G. 2., and consequently that an order on the county treasurer where it ought to have been on the treasurer of a borough, was improperly made, and could not be enforced by indictment. And in commenting on the 9th section 18 G. 3. he said, “the magistrates are only to make regulations respecting their particular jurisdictions, for it would be highly unreasonable that the justices of a particular town or franchise should make orders to regulate the conduct of the officers of the county at large, over whom in general they have no jurisdiction whatever.” (b) It is observable also on the 7th section of the same act,

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(a) 12 G. 2. c. 29. s. 6.

(b) 6 T. R. 241. *Rex v. Myers.*

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that the treasurer who is required to pay, is to be allowed the same in his accounts; but if the defendant is bound by this order to pay, how can he be sure that it will be allowed him in his accounts; for his accounts must be allowed by the county justices (a), who are not bound to allow a payment made to the order of borough justices, not being themselves privy to the order (b); for to hold that they would be bound to allow it, is to suppose that the legislature intended to authorize borough justices by their order to control the discretion of the county justices. The legislature has not so said, nor is it likely that it so intended; but if it did, the answer is, *quod voluit non dixit*.

Lord ELLENBOROUGH C. J. The question is, whether the justices of the borough of *Liverpool*, being justices who have jurisdiction to try grand and petit larceny committed within the borough, had power under the statutes that have been referred to, to make an order, compulsory on the treasurer of the county, for payment of the expences of a prosecution instituted before them at their quarter sessions. Prior to the 25th of *Geo. the 2d* I do not find that any provision was made for defraying the expences of prosecutions for felony. On the contrary, the legislature by the statute which passed in that year, recite that many persons were deterred from prosecuting persons guilty of felony on account of the expence attending such prosecution, which was a cause and encouragement of thefts and robberies; and in order to encourage the bringing of offenders to justice, the statute provides a fund in all cases

(a) 12 G. 2. c. 29. s. 7.

(b) *Ibid.* s. 6.

of felony for defraying these expences; for it enacts, "that it shall be in the power of the Court before whom any person has been tried and convicted to order the treasurer of the county in which the offence shall have been committed to pay to the prosecutor such sum of money as to the Court shall seem reasonable." The Court before whom any person has been tried, must mean any Court before whom a person may lawfully be tried; for the words are general, and the remedy was intended to be co-extensive with the power of trial, and therefore the statute may be read as if it was written *any Court*. Thus as the matter stood upon this statute, it was in the power of any Court to make an order on the treasurer of the county, to pay the expences of a prosecution for felony. The word *place* does not occur in this act; it occurs in the 27 G. 2. And thus the justices of the borough court of *Liverpool* had a power to order the payment of such sum as they should think reasonable for these expences. This order the clerk of assize, or clerk of the peace, is directed to make out; whence it seems to follow, that the power is restrained to such courts as have a clerk of assize, or clerk of the peace. Therefore now it stands, that any court having a clerk of assize or clerk of the peace might order the treasurer of the county to pay to the prosecutor his reasonable expences. It is said that this will operate as a hardship in some cases upon the county, but surely this was a matter for the legislature to consider; and they have pronounced in effect that any court before whom a person is thus tried and convicted shall have this power. They have provided a general fund, and used competent words to enable any court to draw from it. But it occurred to the legislature that there might
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be certain courts where, instead of ordering the county treasurer, it would be proper that they should make the order upon the treasurer of some particular place, which had a treasurer of its own, and a fund peculiar to itself, raised in the nature of, and by the same means as, a county rate. Therefore in such cases the legislature provides in the subsequent act, 27 G. 2. that the order shall be on the treasurer of the county or place. But this word will be found not to apply to the borough of *Liverpool*; because though it has an officer, called a treasurer, yet he is not a treasurer properly so called; for he has not the administration of any public funds, but only of the private funds of the corporation, and may rather be called a steward than a public treasurer. Nor is any rate made within this place in the nature of a county rate. The last statute, 18 G. 3., we find, relates to cases as well where the person has been tried and acquitted, as where he has been convicted, and also to cases where persons shall appear on recognizance or *subpoena* to give evidence, whether any bill be preferred or not; and this enacts that the Court may order the expences to be made out by the clerk of assize, or clerk of the peace, and that the treasurer of the county, riding, or division shall pay the same. I agree that by the fair interpretation of this clause, it must be construed the same as if the word *place* were incorporated in it. But taking it so, here again I ask, is there any treasurer for this place? It is not pretended that there is a treasurer *ejusdem generis* with the treasurer of the county, nor that it has any fund in the nature of a county rate. The 9th section has been pressed upon our notice, which provides that the justices in and for any county, riding, division, city, town corporate, franchise,

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chise, or liberty, in quarter sessions, may lay down or alter, from time to time, such rules and regulations as to any costs thereafter to be allowed to any person by virtue of that act, which rules and regulations, having received the approbation of one or more of the Judges of assize for the county wherein they shall have been made, shall be binding on all persons. It is contended that the legislature would hardly have appointed any persons to make regulations unless they were to have the power to enforce them, and there was some one to pay. The legislature undoubtedly may appoint any description of persons to make regulations, and they have among others appointed the justices of towns corporate. These are therefore the special appointees of the legislature to make such regulations. Perhaps then no such argument or inference can be drawn from this clause. But it appears to me that under the positive words of the act, this being a court which had power to try grand and petit larceny, and other felonies, the justices were by the 25th of G. 2. competent to make an order on the treasurer of the county, in respect of these expences; and such order having been made and disobeyed, this indictment is maintainable. (a)

LE BLANC J. This being an indictment against the defendant as treasurer of the county of *Lancaster*, for disobedience to an order, directed by a Court composed of the justices of the borough of *Liverpool*, for payment

(a) Another objection was taken upon the argument, that the indictment was ill for want of any averment that the order set forth in the indictment was conformable to the rules and regulations made by the borough justices; *sed non allocatur*, for the indictment avers that the order was *duly* made.

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Now the statute (a) in the first place provides for cases where the justices have a limited jurisdiction, and where they have also a treasurer of their own, and funds in the nature of a county rate. And in that case it has been properly determined that the order must be on the treasurer of the district. (b) But does this place constitute a jurisdiction of that description; or does it not remain in the situation of the rest of the county, contributing to the county rate, and having no funds of its own in the nature of a county rate, nor any treasurer to whom such an order can properly be directed? For I take it that the construction of the words "*treasurer of the county, riding, division, or place,*" must be confined to such separate counties, ridings, divisions, or places, as have a separate fund in the nature of a county rate, and a separate treasurer for that purpose. If it has not either, but is contributory to the county rate, it is still a part of the county at large. It is argued that as the county treasurer is not appointed by the borough justices, he is not bound to obey their order; but the answer to this is, that it does not depend on the manner of his appointment, whether he is bound to obey the order or not; because this must depend on the act of parliament. And therefore he is bound to obey the order of a judge of assize who has nothing to do with his appointment, or his accounts, because the act so directs. So it may be in other cases. Then in this case we find that the Court which directed the order had authority to try grand and petit larceny and other offences, and that the person who made out the order was the town clerk, whose duty it is to act as clerk of

(a) See 18 G. 3. c. 15. s. 7.

(b) See *Rex v. Myers*, 6 T.R. 237.

the peace at the sessions. It is not material to inquire on the present occasion how far the objection would have been valid, if the Court had not had an officer such as is mentioned in the statute. The statute says that the Court shall make the order, and that it shall be made out and delivered by the clerk of assize, or clerk of the peace. Whenever a case shall happen where there shall be no clerk of assize, or clerk of the peace, this objection will arise; but it does not at present, as the case states that the Court has a clerk, whose duty it is to act as clerk of the peace. It is also stated that *Liverpool* is not a county, riding, division, or place, which has any separate rate in the nature of a county rate, or any officer in the nature of a county treasurer. It seems to me, therefore, that, consistently with the language of the act of parliament, the Court was fully competent to direct this order.

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BAYLEY J. I am entirely of the same opinion. This offence was, if I may so express it, a county offence, although committed within the borough of *Liverpool*; and unless the prosecutor is entitled to be paid his expences in this way, there are not any other funds out of which they can be defrayed, and he must bear this burthen himself. The statute 25 G. 2. does not seem to have had in view any particular description of courts; it seems rather to have had in view, that in all courts before whom any conviction for grand or petit larceny or other felony took place, the prosecutor should, under the discretion of the Court, be entitled to receive his expences: the words of the act are certainly sufficiently general to extend to every court which has a clerk of assize, or clerk of the peace. Whether on account of these expressions the act does

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or does not exclude such courts as have not either of those officers, it will be time enough to consider when that question arises; for here it does not, because there is an officer belonging to the court who answers to the description of clerk of the peace. The great difficulty that has been raised is on a clause in the 18th G. 3. as to the laying down regulations concerning the charges to be allowed. Now it may be material to observe how the law would have stood in the interval between the passing of the first and last act, supposing such a case as this to have happened during that time. We find the mischief is general, and the language of the act is general; then why is not the act to have a general extension. It is said that the clause in the 18th G. 3. shews that the act was intended to be limited, and not to authorize the justices of every court to make an order on the treasurer, unless they were competent to concur in his appointment, or had a jurisdiction co-extensive with his duties. But it does not seem to me that the words of this clause shew any intention to the effect of narrowing the construction of general words contained in this and the former acts. The clause provides that the justices of the peace in and for any county, division, city, town corporate, &c. in quarter sessions, shall lay down or alter regulations concerning the costs to be allowed by virtue of the act, which regulations, when approved by one of the Judges of assize, shall be binding on all persons. If this provision had been introduced into the first act, it might have been urged that it would have been hard that the county at large should in all cases be bound by regulations to be made by justices of a borough or other inferior jurisdictions; yet even then, as it is provided that these regulations shall be submitted to

a Judge of assize for his approbation, thereby constituting another tribunal, I think that no argument could have been sustained on the hardship in this respect. But the natural consequence of holding a different construction in this case would be, that in all prosecutions for offences committed within a borough, or other limited districts which have not an exclusive jurisdiction of their own, there could be no allowance of the expences; and as it is natural to suppose that prosecutors will always be desirous of casting off the burthen of the expences from themselves, the consequence will be in this particular case that a prosecutor will rather lodge his complaint before the county justices; the result of which will be that all offenders within the borough of *Liverpool* will hereafter be committed for trial either to the assizes or to the county sessions; and by these means the expences of county prosecutions will be greatly enhanced. I do not say that this consequence ought to induce us to put a different construction on the act, if its language were clear the other way; but where the words are general, the argument *ab inconvenienti* is a strong one in favour of this construction. In this case I think the county justices would not be at liberty to gainsay the order made by the borough justices.

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Rule discharged.

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Feb. 1st.

The KING *against* SUTTON.

The king's proclamation, reciting, that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, is admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in those parts.

So, a preamble to an act of parliament, reciting the existence of such outrages, and making provision against them, is admissible for the same purpose.

It is not a misdirection, if the Judge refer the jury to

their own knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence.

An introductory averment that outrages had been committed *in and in the neighbourhood of N.*, is divisible; so that it need not be proved that they were committed in both places; and fourteen or fifteen miles from *N.* may be considered in the neighbourhood.

An introductory averment that the persons engaged in such outrages had been reputed to act under the direction of some *supposed and unknown person*, called, &c. does not necessarily import that the person is an existing person, but proof that he was a fictitious person, set up for the purpose, is sufficient.

AN information filed by the Attorney-General against the defendant for publishing a malicious and seditious libel, to which the defendant pleaded not guilty, was tried before *Graham B.* at the last *Nottinghamshire* assizes. The information alleged, that at divers and very many times before the publication of the scandalous, malicious, and seditious libel, &c. (to wit) in 1811 and 1812, divers and very many acts of outrage had been committed by divers disorderly and ill-disposed persons, in and in the neighbourhood of *Nottingham*, against the property of divers of his majesty's subjects, and particularly against the frame-work knitted stocking, and frame-work lace manufactory, whereby the property of many of the subjects had in several instances been wholly destroyed, and that divers of the persons engaged, and suspected to be engaged, in the perpetration of such outrages, had been reputed to act under the direction of some supposed and unknown person, called *General Ludd*, and had been commonly called *Luddites*, &c., and that there was war between this country and the United States of *America*, and that the defendant, unlawfully and maliciously intending to excite discon-

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tent and disaffection in the minds of the subjects of the king, against the king and his government, and to bring the government of the king into public hatred and contempt, and to excite persons to break the peace, and to commit acts of violence and outrage, unlawfully, maliciously, and seditiously printed and published the scandalous and seditious libel, which it set forth, and which was in the form of a letter from General *Ludd* to the editor of the *Nottingham Review*, contrasting the conduct of his son *Ned*, then serving (as the letter stated) in his majesty's forces under a commission to exercise his prowess against the *Americans*, with the conduct of himself and his family in their united efforts in breaking frames, that while these were commented on with severity, the scales were turned, and their enemies converted into friends, and sung a new tune to an old song, and the deeds of his son were trumpeted forth in every loyal paper, and his son was not now confined to the breaking a few frames, having the sanction of government, &c., and it concluded,—“ though by the bye I am of opinion that all which I and my son have done in *Nottingham* and the neighbourhood, is not half so bad as what my son has done in *America*, but then you know he has supreme orders from indisputable authority for his operations in *America*, and that makes all the difference.” Signed Gen. *Ludd*.

And in order to prove the introductory allegation as to the acts of outrage, the king's proclamation, dated 18th Dec. 1811, and the preambles to two acts of parliament, were offered in evidence. The proclamation recited that it had been represented to the Prince Regent that a considerable number of persons, chiefly composed of persons employed in the stocking

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manufactories, had for some time past assembled together in a riotous and tumultuous manner, in the town and county of the town of *Nottingham*, and likewise in several parts of the counties of *Nottingham*, *Derby*, and *Leicester*, for the purpose of compelling their employers to comply with certain regulations prescribed by themselves with respect to work and the wages to be paid for the same, and had had recourse to measures of force and violence, and had actually committed various acts of outrage in different parts of the counties above mentioned, whereby the property of many of the subjects had in several instances been wholly destroyed, and their lives and properties were still greatly endangered; and the proclamation went on to offer a reward for the discovery and apprehension of persons concerned in such proceedings. The preamble to the first act, 52 G. 3. c. 16. recited, "that the provisions of the 28 G. 3. for the better protecting stocking frames, &c., and for the punishment of persons destroying or injuring such stocking frames, &c. had been found ineffectual, and that such outrages had for some time past been carried on to an alarming extent." The preamble to the second act, 52 G. 3. c. 17. recited, "that considerable numbers of disorderly persons had for some time past assembled themselves together on different occasions in a riotous and tumultuous manner, in several parts of the county of *Nottingham*, and in the town and county of the town of *Nottingham*, and in the adjoining counties, and had had recourse to measures of force and violence, and had actually committed various acts of outrage in different parts of the said counties, whereby the property of many of his majesty's subjects had in several instances been wholly destroyed, and their lives and properties were still endangered."

And

And it was objected that these documents were inadmissible for the purpose for which they were offered in evidence; for *non constat* that the acts of outrage recited in them did really exist, and if they did they were capable of other proof. The learned Judge admitted the first as being an act of the state founded upon the existence of outrages recited in it, and the others as tending to shew the notoriety of their existence. Evidence was also given by several witnesses, one of whom deposed to the existence of outrages in breaking frames in 1811 and 1812, and to his having seen the name of General *Ludd* chalked on the walls of *Nottingham*, and having seen songs respecting him; and that he was present at and assisted in the apprehension of some of the rioters at *Sutton Ashfield*, which is about fourteen or fifteen miles from *Nottingham*, who were running away from a place near to which he afterwards saw many frames broken, and that he heard them call themselves *Luddites*, and speak of General *Ludd*. Another witness spoke of having in 1811 seen riots at *Sutton Ashfield*, and frames broken there; and a third witness deposed to a transaction on the 12th of *February* 1812, at *Nottingham*, when about a dozen persons armed and disguised came into his father's house, and broke the frames, and that one called the other *Ned*, but he did not hear them call themselves *Luddites*, nor that they mentioned the name of General *Ludd*. Another witness also proved that he had heard General *Ludd* much talked of, and that he considered him to be a fictitious person, set up by the persons who committed the outrages in this neighbourhood, as their supposed leader. Upon this evidence, and proof of the publication of the libel, and the innuendos, it was found against the defendant.

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And in the last term it was moved by *Denman* that there should be a new trial; first, because of the improper admission of the evidence objected to at the trial. For the proclamation does not even state as a fact that outrages did exist, but only that it was represented that they did; but if it had stated the fact, it would make no difference, because it could not be proof of the truth of the fact. Even the certificate of the king under his sign manual of a matter of fact (except in one old case in Chancery, *Hob. 213.*) has been always refused. (a) And it appears by that old case that it passed *without exception*. Also the preambles ought not to have been received, because recitals in acts of parliament are not evidence of facts, but only of the opinion of the legislature. For instance, if one of these acts had recited that any particular house in *Nottingham* had been tumultuously destroyed, would this be evidence that the thing was so? As well might it be said that the insulting and arresting the person of the *Russian* ambassador, recited in 7 *Ann. c. 12.*, or the stabbing of *Harley* by *Anthony de Guiscard*, recited in 9 *Ann. c. 16.*, with the circumstances attending each of those transactions, might have been proved by the preambles to those acts of parliament, as evidence of the facts against the persons who were charged with having committed them; for if these recitals be evidence for one purpose, they must be so for all. Next, it was objected that the allegation, that acts of outrage were committed in the neighbourhood of *Nottingham*, was not proved, for the place to which the proof applies is fourteen or fifteen miles from thence, and therefore cannot be fairly said to be in the neighbourhood. Lastly, it was objected, that the Judge had misdirected the jury,

(a) Per *Willes C. J.*, *Willes*, 556.

because

because in the course of his summing up, he had stated to them that they were at liberty to refer to their own personal knowledge, if they saw any of those acts committed. Which doctrine, however it may have prevailed in ancient times, has been long exploded, and is incompatible with modern practice. (a)

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The Attorney-General, Clarke, Vaughan Serjt., Reader, and Reynolds now shewed cause, when it appearing by the Judge's report, that he did not refer the jury to their own personal knowledge, as matter of proof, for he stated that he conceived there was proof enough without it, but only as illustrating that which had been given in evidence, they contended that here was no misdirection. For is it meant to be said that a jurymen is bound to reject all he knows, and is not at liberty, like other men, to use his own experience, in judging whether any particular facts which have been proved, are true? As if a fact which is perfectly notorious be proved by witnesses, is not the very notoriety one step towards the conclusion that the witnesses speak true? And even if the jury have received improper evidence, as where one of them, after the withdrawing of the jury, offered evidence to the others, yet if the Judge reports that the verdict is according to the evidence, a new trial shall not be granted. (b) And as to the admissibility of the evidence, the king's proclamation is an act of state, of which all ought to take notice (c);

(a) 3 Bl. Com. 374.

(b) *Kitchen v. Manwaring*, cited *Andr.* 321. But as to whether a jurymen's offering evidence to his companions without being sworn, will avoid the verdict, see 2 *Hale P. C.* 306. *Sid.* 235, *Goodman v. Cotherington*. *Styles*, 233, *Bennet v. Hundred of Hertford*. *Tri. per Pais*, 209, *Duke v. Ventris*. *Salk.* 405, *Anon. Bull. N. P.* 313.

(c) *Wells v. Williams*, *Ld. Raym.* 283. per *Treby C. J.*

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for it is a principle that every thing which relates to the king, as king of this country, is in its nature public, and therefore a gazette which contains any thing done by the king, in his character of king, or which has passed through the king's hands, is admissible evidence in a court of law to prove such thing. (a) Thus the journals of the House of Lords were admitted to prove the address to the king, and the king's answer to the House, in order to make out an averment in the indictment that divers controversies existed between his late majesty and his allies, and the king of *Spain*. (b) In like manner, as every man in *England* is, in judgment of law, party to the making of an act of parliament (c), and the preamble is a part of the act itself, surely these preambles were evidence to shew that the enactments were founded upon the mischiefs recited in them. And that such mischiefs did exist was proved by the testimony of eye-witnesses: as it said indeed, not in the neighbourhood of *Nottingham*, because they were fourteen or fifteen miles off; but this is, in a popular sense, the neighbourhood, agreeing with one definition of that word, viz. "Those that live within reach of communication." (d)

Denman and *Phillipps*, contra, argued that it was plain, that both the proclamation and preambles must have been offered in proof of the averments in the information, because the averments are laid in the very same words: and though these documents might be evidence that the executive government and the legislature acted upon certain representations made to them, this

(a) *Rex v. Holt*, 5 T. R. 445. Per Buller J

(b) *Rex v. Franklin*, 9 St. Tr. 259.

(c) 1 Bl. Com. 185.

(d) *Johnson's Dict.*

by

by no means proves what the information alleges, that the facts represented were true, but only that the government and legislature gave credit to them; for if they could be carried farther, they would have greater weight than judgments, which are not evidence of any collateral matter. And as to their proving that the facts were notorious, if by that is meant a notoriety such as exists in general rumour, then the jury ought not to have taken that into their consideration; if it be meant that all the world knew them, then *a fortiori* they might and ought to have been proved. For to assume that the recital in every act of parliament is even *prima facie* evidence of the facts recited in it, would lead to very extensive consequences, and might sometimes perhaps bring the truth into hazard; as if the statute which passed at the dissolution of monasteries, should be taken as evidence of the fact that the abbots and priors, &c. of their own free and voluntary minds, and without constraint, &c. surrendered to the king, because the statute so recites. (a) So the preamble to a modern statute (b) recites, that *Malta* is now in the possession of his majesty, when it might have happened that at that time it was in the enemy's possession. And it is singular that one of the preambles now in question should have recited that these disorders pervaded the county of *Nottingham* and the *adjoining counties*, so that if this were evidence it might be adduced as proof that they existed in *Lincolnshire*, when it is perfectly well known that that county has been entirely free from them. But it may be asked, what peculiar force is there in the preamble of an act of parliament, that it should attract to it verity

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(a) 31 H. 8. c. 13.

(b) 41 G. 3. c. 103.

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in every particular? It is but matter of inducement, and cannot be founded upon oath, for neither branch of the legislature can for this purpose administer an oath; whereas all evidence ought to be upon oath; and no instance is stated to warrant the admission of a recital either in an act of parliament or proclamation to prove a fact in issue. If indeed a mere act of state is to be proved, as that addresses were presented to his majesty (*a*); or a matter of diplomacy, as that the country stood in any particular situation with regard to its foreign relations (*b*); which are the cases cited *contra*; these from their nature can only be proved by state documents; but how does this apply to facts like the present? And as to the argument that there is evidence enough without these documents to sustain the verdict, whatever may be the rule as to that in civil actions, there is no such rule in criminal cases; on the contrary, the rule here is, that if amidst evidence which was proper to be given, evidence which was inadmissible was received, inasmuch as the Court cannot know upon what part of it the verdict was founded, nor even that the jury may not have disbelieved so much of it as was lawful, and acted upon that which ought to have been rejected, a new trial shall go. Also, in addition to the objection that there is no proof to sustain the allegation that outrages were committed in the neighbourhood of *Nottingham*, there is this defect in the proof of the allegation concerning those which were committed in *Nottingham*, that they are not proved to have been committed by persons called *Luddites*, or that they were acting under a supposed and unknown person called General *Ludd*;

(*a*) *Rex v. Holt*, 5 T. R. 442.

(*b*) *Rex v. Franklin*, 9 St. Tr. 255.

for

for all that is proved upon that subject is, that General *Ludd* was chalked on the walls; but the evidence negatives that any such name was mentioned at the time, or that any one of the party was called a *Luddite*. There is nothing therefore to connect these persons with this name, or as acting under General *Ludd*. So the allegation concerning the person called General *Ludd* is disproved; for the alleging that he was a supposed and *unknown* person, imports that he was an existing person; whereas it was proved that such a person was altogether fictitious.

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LORD ELLENBOROUGH C. J. If in this case I had been able to detect any particle of proof that ought not to have been offered to the consideration of the jury, I should have thought such vicious proof would have corrupted the verdict and avoided it. But after the utmost attention, I am unable to discover that there is any vice in any particle of this evidence. The material objection upon which the rule was obtained, was founded upon a supposed misdirection of the learned Judge at the trial, viz. that he had referred, in aid of some defect of evidence, to the personal knowledge which the jurors might possess, for proof of the fact that outrages had been committed in *Nottingham*; for as to their having been also committed in the neighbourhood of *Nottingham*, I do not think that it is material to prove both. It now appears however from the report, that the Judge did not lay any stress on the personal knowledge which the jury might be supposed to possess in order to aid any defect of evidence. On the contrary, it appears that he considered the evidence as fully sufficient to establish a verdict in favour of the crown; only he made
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the observation with reference to what they knew, as a matter of illustration, that it formed a part of the history of the county, that such outrages had been committed ; as if he had said, every one must be aware of what has passed before their own eyes, and at their own doors ; but he did not advise them to rely on that as a source of information on which they were to found their verdict, but only that it might make the proof more satisfactory to their minds, if they knew what had passed, because no one can have any reason to doubt what he knows and sees. It is conclusive, I think, upon the report, that the Judge did not leave this to the jury as forming a branch of evidence of itself. Next it is objected, that the acts of parliament were not evidence. For what purpose, then, are the Judges bound to take judicial notice of public acts of parliament, but in order that they may have a knowledge of them themselves, and communicate it to others ? The Judge is bound not only to take judicial notice of their contents himself, but also to state the same to the jury ; for if he is not to state them, for what purpose is he to take notice of them ? According to the argument for the defendant, the Judge would be bound to take notice of them, yet would be precluded from stating them. I do not say how far this evidence was conclusive ; I only say that it was admissible. Public acts of parliament are binding upon every subject, because every subject is, in judgment of law, privy to the making of them, and therefore supposed to know them, and formerly the usage was for the sheriff to proclaim them at his county court ; and yet what every subject is supposed to know, and what the Judge is bound judicially to take notice of, it is said the jury cannot advert to ; for if this evidence was inadmissible,

admissible,

admissible, it must be because the jury could not be charged with it. Next, as to the proclamation, I consider it as an act of state. The proclamation recites, that it had been represented to the Prince Regent, that a number of persons had committed various acts of outrage in the town, and in different parts of the county of *Nottingham*, &c.; and that the Prince Regent has thought it necessary to propound certain rewards for the discovery and conviction of the persons concerned in such proceedings. The propounding of these rewards necessarily implies that such acts of outrage have actually been committed, for otherwise it would have been nugatory to propound them. I do not say that it was conclusive evidence of the fact that these outrages were committed; but surely it was admissible, and like other acts of state to be laid before the jury. Next, as to the proof of the allegation that the persons committing these outrages were denominated *Luddites*; this was proved by eye-witnesses, and the very name of General *Ludd* on the walls confirms the common reputation that he was the supposed head of the persons acting under the denomination of *Luddites*. It is said, the information alleges that this was some supposed unknown person, and that it was not proved that there was any such person, but on the contrary, that he was altogether fictitious; but yet he was supposed to have existence for the purpose of carrying on these outrages, and whether he existed as a real or a fictitious person can make no difference. We read of the fancied existence of gnomes and sylphs, who are imaginary beings created and existing for the purpose of the plot they are to carry on, and who for this purpose at least must be treated as realities. In like manner this person had

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had an existence, though it was created, and existing only in fiction for a particular purpose. Mr. *Hobhouse* said that he did not believe that there was actually such a person, but that he was set up as a person for the purpose of carrying on these outrages. It seems to me, therefore, that all the allegations and descriptions are made out in proof, and that there is not any part of this evidence to which it can fairly be excepted that it was inadmissible. And if this be so, I do not think that on account of an observation made to the jury by the learned Judge *ex abundanti cautela*, this verdict ought to be disturbed. The report has cleared the case of the objection upon which the Court was principally induced to grant the rule. As it now stands, I am satisfied that the verdict was founded upon sufficient evidence, and that there has been no misdirection.

LE BLANC J. This is an application for a new trial after conviction upon an information charging the defendant with having published a seditious libel. The application is grounded upon three objections; first, on account of the admission of evidence which ought not to have been admitted; secondly, because of the want of proof of certain allegations in the information; and thirdly, because the jury were referred to certain knowledge of their own as matter of evidence. This rule was granted upon a ground which I think cannot be disputed as a rule of law, namely, that if a verdict in a criminal proceeding like the present passes upon evidence, some parts of which are inadmissible and other parts admissible, the Court has not the means of referring the verdict to those parts only which were admissible, and it is their habit in such a case to grant

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a new trial. Therefore it becomes very material in this case to examine whether any evidence was received which ought not to have been received; and in considering this it is in the first place material to advert to the nature of the libel. It is a libel in the form of a letter from General *Ludd* to the editor of the *Nottingham Review*, reflecting on the conduct of his majesty's government, by comparing the conduct of the military serving in *America*, with the conduct of certain persons acting in *Nottingham* and the neighbourhood under the description of *Luddites*, representing that the son of the supposed writer who was serving in his majesty's forces in *America*, was now applauded for acts done by him in that country, similar to those for which the persons called *Luddites* were condemned in this country. Such is the nature of this libel. The first introductory allegation is, that before the publishing of the libel, many acts of outrage had been committed by divers disorderly persons in, and in the neighbourhood of *Nottingham*, by the destruction of frames. Now as to the objection that so much of this allegation as respects the committing of outrages in the neighbourhood was not proved, a satisfactory answer has already been given to it, namely, that it is not necessary. But as to its not being proved, there was one witness who proved the forcible attack by an armed party upon a dwelling-house in the town of *Nottingham*, and their breaking the frames there, and two other witnesses proved outrages of the same sort to have been committed in the county of *Nottingham*, at about fifteen miles distant from *Nottingham*. Therefore, if it were necessary to prove both parts of this allegation, I should think the evidence was sufficient. The next allegation is, that divers persons engaged in these

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outrages had been reputed to act under some supposed and unknown person called General *Ludd*, and had been commonly called *Luddites*. As to which the parol evidence proved that in two instances the persons committing these outrages called themselves *Luddites*, and spoke of General *Ludd*, and that that name was also chalked on the walls of *Nottingham*. Now this seems to me sufficient to substantiate the allegation, that persons who committed the outrages called themselves *Luddites*; and the name of General *Ludd* being chalked on the walls of *Nottingham* was also evidence of the other part of the allegation, that they were reputed to act under a supposed leader of that name. As to his being an unknown person, Mr. *Hobhouse* proved that some persons might suppose there was a real person of that name, but that he considered him only as a fictitious person. This was certainly evidence in support of the introductory allegation, unless encountered by evidence on the other side. And that brings me to another objection, viz. that here evidence was received which ought not to have been received. This evidence consists of the king's proclamation, reciting that it had been represented that certain disturbances caused by persons employed in the stocking manufactories had taken place in *Nottingham* and several parts of the county, and offering a reward for the discovery and apprehension of offenders. There are likewise two acts of parliament reciting in their preambles the existence of these outrages, and making provision in the body of them, the first, for the more exemplary punishment of persons committing these outrages, the second, for the better preserving the peace, by enforcing the duties of watching and warding. When the nature of these documents is considered, is

It possible to say that they were not admissible, particularly as the libel refers to the conduct of the persons called *Luddites*, in destroying frames in *Nottingham* and the neighbourhood, and compares that conduct with the conduct of the military in *America*? Are not the documents material to shew that these disturbances existed in *Nottingham*, and existed to such a degree as to call for the interference of the executive government, and the legislature, to offer reward for their discovery, and to inflict a more exemplary punishment upon them, and to protect the peaceable inhabitants by compelling the observance of watch and ward? Surely they were evidence for this purpose, when the inquiry respected a libel of the description laid in the information, tending, as it is charged, to alienate the minds of the subjects from the king and government, and to make them think that what had been condemned at *Nottingham* by the government, was held laudable in *America*; when, according to the language of the libel, they were singing a new tune to an old song. I cannot see therefore any ground on which these public instruments could be objected to as inadmissible. They seem to me to go clearly to prove the facts which are alleged, because they shew in what way the executive government and the legislature acted upon them. The last objection is, that the Judge at the trial of this information left it to the jury upon their own personal knowledge, as evidence of the fact, to determine that these outrages had been committed. The Judge's report is an answer to this objection, for it states that he never left it to the jury to determine on their own personal knowledge that acts of outrage had been committed, but that he left that question to them upon the evidence. But in order perhaps

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to obviate some observations that might have been made to the jury, to induce them to disbelieve the witnesses who spoke to these transactions as having been eye-witnesses, the Judge might advert to facts which were notorious to them as doing away the weight of any such observations. It seems to me therefore that we ought not to grant a new trial in this case, and that in refusing it we are doing nothing but what is perfectly consistent with the rule, which I admit to be a fundamental one, that where improper evidence has been received at the trial, the Court cannot sift it in order to see whether there be not enough which was admissible to sustain the verdict; because they cannot say on what part of the evidence the verdict was founded.

BAYLEY J. Although I have not been free from doubt at times, yet on the best consideration that I am able to give to this case, I think that no evidence was received that was not admissible. And if the evidence had been confined to one branch of the allegation, either to outrages in *Nottingham*, or in the neighbourhood of *Nottingham*, I should have thought it a divisible allegation, and that such evidence would have been sufficient. The fact of outrages having been committed was proved not only by eye-witnesses, but the libel itself furnished strong evidence, upon its own admission, that such outrages had been committed; because the libel adverts to the breaking of frames as existing acts; and then the supposed writer speaks of what he and his son have done in *Nottingham*, there being no other acts mentioned as done by him but the breaking of frames: so that the libel itself goes to shew that outrages of this sort had been committed. The question then is reduced

to

to this, whether the verdict is ill on account of the admission of the king's proclamation, and the two acts of parliament, in evidence. The proclamation sets forth, that it had been represented to the Prince Regent that a number of persons, chiefly of those employed in the stocking manufactories, had actually committed various acts of outrage; it is therefore an assertion on the part of His Royal Highness, that such a representation had been made to him, and he proceeds to act upon it, by offering a reward for the discovery of such offenders. This I think was evidence to this extent, and no farther, that a representation was made to the executive government that such outrages existed, and that the executive government thought fit to act upon it; for they so far acted as to promulgate an act of state upon it. Therefore I cannot say that it was to be rejected, where there was other evidence. The preambles to the two acts of parliament I think are still more free from objection than the proclamation, and they assume as facts that outrages did exist. When we consider in what manner an act of parliament is passed, and that it is a public proceeding in all its stages, and challenges public enquiry, and when passed, is in contemplation of law the act of the whole body, it seems to me that its recital must be taken as admissible evidence (a), and in this case was confirmatory evidence. There is one point upon which for some time I entertained a doubt, namely, as to the allegation that these persons were reputed to act under some supposed and unknown person, whether this did not imply an existing person; but what has fallen from my Lord and my brother *Le*

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Blanc, has in a great measure removed that doubt; and I am not so convinced that it does import an existing person as to differ in any respect from the rest of the Court.

Rule discharged.

The defendant on a subsequent day was sentenced to one year's imprisonment in *Northampton gaol*.

Tuesday,
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DOE, on the Demise of TYRRELL, against
LYFORD and Another.

Where T. T. was seised of a messuage and lands in a parish, and in two hamlets of the same parish, which he purchased of L., and let to a tenant at one entire rent, and afterwards other lands were allotted to him under an inclosure act, in lieu of the said lands, except the messuage and two acres, which remained as before, all which the tenant continued to hold at the same rent as before; and afterwards T. T. devised all his messuage, farm, and lands, &c. situate in one of the two hamlets by name, in the said parish which he purchased of L.: Held that the lands in the other hamlet did not pass; and that evidence *dehors* the will to shew that he intended to pass all the lands which he purchased of L. was not admissible.

AT the trial of this ejectment before *Dallas J.* at the last *Berkshire* assizes, there was a verdict for the plaintiff, subject to the opinion of the Court upon a special case, which was in substance this:

Thomas Tyrrell in *March* 1780, purchased of one *Lovibond* certain lands, which were conveyed to him in fee by *Lovibond*, by lease and release of the 24th and 25th of that month, parcel thereof being described as a close in *Sutton Wick* in the parish of *Sutton Courtney*; other parcel, as eleven acres and half of arable land in the common fields of *Sutton Wick*; other parcel, a messuage or tenement and close in *Sutton Wick*; and other parcels described as lying in *Sutton Courtney* and *Sutton Wick*. *Sutton Courtney* is a parish comprising three hamlets, of which the hamlet of *Sutton Courtney*, and the hamlet of *Sutton Wick* are two. Afterwards in

September

September 1804, the commissioners under an act for inclosing the lands in the parish of *Sutton Courtney* and the hamlet of *Sutton Wick*, by their award allotted to *Tyrrell* other lands in five allotments, in lieu of those conveyed to him by *Lovibond*; one of which allotments was a plot of land in *Galley Leys*, another, a plot of land in *Hulgrove*, both situate in the parish of *Sutton Courtney*, but out of *Sutton Wick*; another was a plot consisting of 14A. 2R. 6P. which comprized two acres, part of the original lands purchased of *Lovibond*; and the house, homestall, and orchard also remained as before the act, and were not altered by the award. *Tyrrell* being thus seised in fee on the 31st of *March 1806*, makes his will and devises to his grandson *James Langford* all that his messuage or tenement, farm, lands, and premises, with the appurtenances situate, lying, and being at *Sutton Wick* in the parish of *Sutton Courtney*, which he lately purchased of and from *Lovibond*, to hold the same to the use of his grandson, his heirs, and assigns for ever; and he also bequeaths to him all his cattle, corn, and grain, as well growing as severed, hay, stock, utensils and implements in husbandry, dairy, household furniture, and all other his goods and chattels, personal estate and effects whatsoever and wheresoever, subject to payment of debts, and appoints him executor; and dies in *Dec. 1806*, being at the time of his death seised of no other lands except the five allotments and the messuage, &c. All the premises purchased of *Lovibond* were in *Tyrrell's* possession before the inclosure, and were let by him to one *Wise* at a yearly rent, and *Wise* continued tenant of them until the award, and afterwards held all the premises allotted in lieu of them at the same rent. On the

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3d *March* 1806 a notice to quit, signed by *Tyrrell*, and directed to *Wise* at *Sutton Wick*, was served on *Wise*, in pursuance of which *Wise* quitted in *Tyrrell's* lifetime. The notice was "to yield up the possession to me at *St. Michael* next ensuing of all that messuage or tenement, orchard, garden, barns, stables, pigeon-house, arable land, meadow grounds, commons, and all other the premises, with their and every of their appurtenances, which you now rent of me, *situate and being at Sutton Wick in the parish of Sutton Courtney*."

And this ejectment being brought by the testator's heir at law against the defendants, who claimed under the devise, for the two plots in *Galley Leys* and *Hulgrove*, in the parish of *Sutton Courtney*, but out of *Sutton Wick*, the notice to quit was offered in evidence on the defendants' behalf, to shew that the testator treated the whole estate as lying in *Sutton Wick*, and it was received subject to the opinion of the Court as to its admissibility. And two points were made upon this case; first, whether the notice to quit was admissible; and if the Court should be of opinion that it was not admissible, then to be struck out. 2dly, Whether *T. Langford*, the devisee, took under the will all the lands in the parish of *Sutton Courtney*, or only such parts of them; as are within the hamlet of *Sutton Wick*. In the latter case the verdict to stand, in the former a nonsuit to be entered.

Abbott, for the plaintiff, argued, first, that the notice to quit was inadmissible. For the rule is, that where it is not necessary to receive the evidence in order to give effect to the will, but the will has an effective operation with-

without it, the evidence is not admissible. (a) And this is not a latent ambiguity; which means, some ambiguity arising from matter *dehors* the will, which would defeat the devise, unless it were allowed to be explained by other extrinsic matter; as if there be two persons of the same name with the devisee (b), or a devise be to one by name with a false description (c); which is not the case here. For, secondly, this will has an effective operation to pass the lands at *Sutton Wick*, but no farther. For as to the lands at *Sutton Wick*, the language of the will is precise, "all that his messuage, &c. situate, lying, and being, at *Sutton Wick*;" and being precise as to one hamlet, nothing of the land in the other hamlet shall pass. As if a man being seised of lands in a vill, and in two hamlets of the same vill, devise all his lands being in the vill, and in one of the two hamlets by name; nothing in the other shall pass. (d) Or if he be seised of lands called *Hayes-lands* which extend into two vills, *Cokefield* and *Cranfield*, and devise all his lands in *Cokefield* called *Hayes-lands*, only the lands in *Cokefield* shall pass. (e) So, *Street* is a vill, and *Walton* is a vill, and both in the parish of *Street*, a fine is levied of all his lands in *Street*, the land in *Walton* does not pass. (f) And the award in this case makes no difference, because as well before as after the award he had lands of both kinds, and the will mentions but one. And as to the addition "which he lately purchased of *Lovibond*," to the

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(a) 3 Taunt, 147, *Doe v. Oxenden*. Ante, vol. iii. 171, *Doe v. Greening*.

(b) *Jones v. Newman*, 1 Bl. R. 60.

(c) See *Thomas v. Thomas*, 6 T. R. 670.

(d) *Dyer*, 261. b.

(e) *Cro. Eliz.* 674, *Woodden v. Osbourn*. *Cro. J.* 22. S. C., *Tuttesham v. Roberts*.

(f) *Dyer*, 261. b. in notis.

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devise of "all his messuage, &c. at *Sutton Wick*," this is a true reference, and the whole is true if the devise be limited to the lands at *Sutton Wick*, but if it be extended to those in *Sutton Courtney* also, it will be true only in some sort, but false as to the place where the lands are situate. But according to Lord *Bacon* in his comment upon the 13th maxim, *non accipi debent verba in demonstrationem falsam, quæ competunt in limitationem veram*, the rule is, "if I have some land wherein all these demonstrations are true, and some wherein part of them are true, and part false, then shall they be intended words of true limitation to pass only those lands wherein all those circumstances are true." (a)

Jervis, contra, argued that all the lands passed. For the devise includes lands of two descriptions, viz. those at *Sutton Wick*, and also those which he purchased of *Lovibond*, which make together all the lands. And the addition "which he purchased of *Lovibond*," distinguishes this case from the cases cited *contra*, because in them the testator devised only one description of land. But here all the lands having been originally purchased of *Lovibond*, and being held by unity of title as well as of possession, and let at one entire rent both before and after the inclosure, it is reasonable to suppose that the testator did not intend to separate them, but to devise generally all the estate which he purchased of *Lovibond* though he described it as at *Sutton Wick*, that being the place where the capital messuage, &c. was situate. And the award under the inclosure act, coupled with the words of this devise, raises a latent ambiguity, be-

(a) *Maxims of the Law*, 77.

cause it appears by the award that they are not the lands which he actually purchased of *Lovibond*, but exchanged lands; wherefore it became necessary to inquire what the will meant by the expression "which he purchased of *Lovibond*." And for this purpose the notice to quit was very material to shew that the will meant all the lands comprehended in the award, because it shewed that the testator had dealt with them as with the lands actually purchased of *Lovibond*, by continuing them in the hands of the same tenant, and giving them all one general local description as being at *Sutton Wick*. Wherefore this notice was properly admitted, according to the acknowledged rule for explaining a latent ambiguity. (a) And as to *Doe v. Oxenden* (b), and *Doe v. Greening* (c) the answer has already been given, for in the one it was simply a devise of "the estate in lands at *Coscombe*", in the other of "my estate of *Ashton*," without any such addition as in the present case.

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LORD ELLENBOROUGH C. J. "My estate of" was a term of much more extensive import than any of the terms in the present devise, and might make it somewhat doubtful whether it was not meant as a term of general description, denoting all which belonged to the estate; as if the deviser had said, my estate under all the circumstances under which I enjoy it. This devise points to two distinguishing marks to denote the property, one of local description, viz. "situate at *Sutton Wick*," the other, of particularity, viz. "which I lately purchased of *Lovibond*." Certainly no argument has been foregone which could have been made for the de-

(a) *Beaumont v. Fell*, 2 P. Wms. 140.

(b) 3 Taunt. 147.

(c) Ante, vol. iii. 171.

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fendants, and when the argument first commenced, I was inclined to adopt as large a construction as possible in order to prevent the estate from being severed. But here the will is fully operative to pass the lands at *Sutton Wick*, and there is nothing in the description of them from which any ambiguity is raised as to the property; for if you look to the words, "which he purchased of *Lovibond*," the devisor had lands answering that description, and also the other description, if you look to the words, "situate at *Sutton Wick*. So that there is not any occasion to refer to extrinsic evidence in order to give this will effect. If there is no latent ambiguity, I cannot see any necessity to look beyond the terms of the will in order to give it a wider range. The argument of inconvenience arising from the separation of the estate would lead into much too wide a field. This is a devise of his lands at *Sutton Wick*, and at *Sutton Wick* only, which were purchased of *Lovibond*; not of all his lands which were purchased of *Lovibond*, but of all at *Sutton Wick* which were purchased of *Lovibond*.

LE BLANC J. It may very possibly be that this testator intended to give something different from that which the Court is bound to say he meant upon the construction of this will. But it is better that known established rules should be abided by, than that we should admit parol evidence, where it is not within the range of decided cases, and thereby incur the hazard of overturning ancient landmarks. The question as to the admissibility of the evidence turns on this, whether there is any latent ambiguity. Now the rule is clear, that if there be a patent ambiguity, that is, one which

appears

appears upon the will itself, it must be determined on the will, and parol evidence cannot be admitted to explain it; but where it is a latent ambiguity, that is, where it seems certain enough upon the will, but the ambiguity is raised by some extrinsic matter, there parol evidence may be received in order to explain that which is made doubtful by parol. But here the extrinsic matter, as it seems to me, raises no ambiguity, for it does not appear, as in the case where there are two persons of the same name, that here are two hamlets of *Sutton Wick*, or two estates purchased of *Lovibond*; and therefore to admit the evidence in this case, would be to admit evidence where there is no ambiguity to explain. For what is this case? The testator became the purchaser of an estate from *Lovibond*, consisting of lands partly in *Sutton Wick*, and partly out of *Sutton Wick*, and these lands were afterwards in part changed, and other part of them was not altered by the award. At the time, therefore, of making his will, he had clearly some lands in *Sutton Wick* which he purchased of *Lovibond*, and in this situation he devises "all his messuage, farm, lands, and premises situate at *Sutton Wick*, which he purchased of *Lovibond*." It is clear, therefore, that as to those parts in *Sutton Wick* which were unchanged by the award, namely, the house, homestall, &c. and two acres, the will must be operative to pass them, for they were the very identical lands he purchased of *Lovibond*; so that this property exactly corresponds with the description in the will. But the rule laid down by Lord *Bacon* in his maxims, as well as several of the cases cited, shew distinctly, that if a man pass lands describing them by particular references, all of which references are true, we cannot reject any one of them. And yet if we were
to

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to hold in this case, that the lands out of *Sutton Wick* passed, because they together with those in *Sutton Wick* were all purchased of *Lovibond*, we should act in defiance of this rule, for we should reject one part of the description. This I am not inclined to do. It seems to me, therefore, that the only way of construing this will is to adhere to the established rule, that where the will is satisfied without it, the Court will not go into extrinsic evidence, in order to raise difficulties as to the intention, but will construe it so as to give effect to every word of the devise.

BAYLEY J. In devises, the rule of construction is, to make use of all the words, and not of part, and therefore where a testator dies seised of property which exactly corresponds with every part of the description given in the devise, we are not at liberty to resort to extrinsic evidence in order to shew that he intended to pass other property which answers that description only in part. In this case the testator had property to satisfy the entire description in the will, and therefore we cannot reject a part of it. The purchased lands lay partly in *Sutton Courtney* and partly in *Sutton Wick*; of these the messuage, &c. remained at the time of the will as before; the lands were in a great degree changed by the award, but two acres were the same. *Sutton Courtney* was the more general description, and if the devisor had made use of that, and devised all his lands in *Sutton Courtney*, all his lands as well in *Sutton Wick* as *Sutton Courtney* would have passed, because *Sutton Wick* is a subordinate description; but he devises "all that his messuage, farm, lands, &c. at *Sutton Wick*, in the parish of *Sutton Courtney*, which he lately purchased of *Lovibond*."

bond." The testator having land in *Sutton Wick* in the parish of *Sutton Courtney*, which he purchased of *Lovibond*, how should we be warranted in saying that he intended to pass lands not in *Sutton Wick* but in *Sutton Courtney* in the parish of *Sutton Courtney*? We may conjecture that such was his intention, but it would be only conjecture. Perhaps the only word that leads to this conclusion is the word "farm," which, as it relates to an entire subject, may be said to require the whole property beside that which lies in *Sutton Wick* to compose it, and therefore the devise must be carried beyond *Sutton Wick*. But the word is of such indefinite meaning that I cannot be positive that the testator by using it meant to pass the whole. It is unnecessary to go through the authorities, the general rule being agreed, that we ought not to reject any words, which are capable of taking effect, that is, provided there be property to satisfy the entire description in the will.

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Judgment for the Plaintiff.

The KING *against* The Inhabitants of HARTINGTON-UPPER-QUARTER.

Wednesday,
Feb. 7th.

BY an order of two Justices stated to be made upon the application and complaint of the overseers of the poor of the township of *Hartington-Upper-Quarter* in the parish of *Hartington* in the county of *Derby*, reciting that it appeared upon the examination of *M. L.* upon oath and by other due proof &c. that the said *M. L.*

Order of filiation on the putative father, stating that the child is likely to become chargeable, held sufficient, without shewing that it was actually chargeable.

If the order directs a sum to be paid towards the lying-in and maintenance, it seems to be enough, without stating that the sum was expended by the overseers. And if it be stated to be on complaint of the overseers of a township, it need not state that it is a township maintaining its own poor.

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was on the 7th of *May* delivered of a bastard child in the said township, and that the said child *is likely to become chargeable* to the inhabitants of the township, &c. the Justices adjudged the same to be true, and that *W. B.* was the reputed father, and ordered as well for the relief of the inhabitants of the said township, as for the maintenance of the child, that *W. B.* should pay to the overseers of the township 1*l.* 1*9s.* for and towards the lying in of the said *M. L.* and the maintenance of the said bastard child to the time of making the order, and for and towards the costs of the same, and from thenceforth weekly so long as the child should be chargeable 4*s.* towards the maintenance of the child, &c. And because the order did not state that the child was *actually chargeable* to the township, the justices at sessions, upon appeal, quashed the order, subject to the opinion of this Court as to the validity of this objection.

And now it was insisted by *J. Balguy* and *Denman* in support of the order of sessions, that the 18 *Eliz. c. 3. s. 2.* only concerns bastards who are actually chargeable; for the language of the preamble is “*the said bastards being now left to be kept at the charges of the parish where they be born;*” &c. and the statute enacts, “*that two justices shall take order for the better relief of such parish.*” And so the other statutes likewise contemplate that the bastard has become a charge to the parish. (a) For which reason an order upon the putative father to maintain him till the age of fourteen is ill, because the justices have no authority but to indemnify the parish, by obliging him to maintain the child so

(a) 13 & 14 *Car. 2. c. 12. s. 19.* 6 *G. 2. c. 31.* 49 *G. 3. c. 68.*

long as it shall be chargeable to the parish (a). Therefore it ought to appear on the face of this order that the child is left at the charge of the parish, for its being a bastard does not make it chargeable no more than a single woman's being pregnant makes her chargeable. (b) Next it was objected that the order ought to have stated that the sum directed to be paid towards the lying in and maintenance had been expended by the parish officers, or that it was a necessary sum. Lastly, the order appears to be made on the complaint of the overseers of the township, but it does not appear that this is a township which maintains its own poor, and unless it so appears, the justices have no authority to make an order. (c)

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N. Clarke, contra, upon the first objection cited *Rex v. Luffe* (d), and *Rex v. Matthews*. (e)

And *per Curiam*. (f) Those authorities are sufficient. And as to the second objection, supposing it to be valid, it would only operate *pro tanto*. And to the last objection they said, there could be no overseers for the township unless the township maintained its own poor; the shewing that it has overseers necessarily implies that it maintains its own poor.

Order of sessions quashed.

(a) *Salk.* 478, *Rex v. Barebaker*.

(c) *Rex v. Mitford*, 1 *Bott*, 489.

(e) 2 *Salk.* 475.

(b) *Rex v. Alveley*, 3 *East*, 563.

(d) 8 *East*, 193.

(f) *Le Blanc J.* was absent.

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Wednesday,
Feb. 7th.The KING *against* The Inhabitants of HORNDON-
ON-THE-HILL.

The taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10s. 6d. as a quit-rent, and also a grant of a licence to inclose a piece of ground for a garden to the said cottage, both being parts of the waste, and building a cottage thereon, and residing in it a year and a half, were held not to confer a settlement; this being a licence only, and not a grant of any interest in land.

TWO justices by an order removed *Benjamin Brad*, his wife and children, from the parish of *Orsett* to the parish of *Horndon-on-the-Hill*, in the county of *Essex*, which order was confirmed, upon appeal to the quarter sessions, subject to the opinion of this Court on the following case:

The pauper being legally settled in *Horndon-on-the-Hill*, applied to the lord of the manor of *Orsett* for licence to erect a cottage on the waste lying within the parish of *Orsett*. The court rolls were produced by the steward, containing the following entry: "Manor of *Orsett*, 9th Nov. 1805. At a general court baron then held, the lord of the manor granted licence to *Benjamin Brad* to erect a cottage on a piece of land, containing one rood, in the lane leading, &c. rendering an annual rent of 10s. 6d. at *Michaelmas* in every year, as a quit-rent for the same." No other consideration was paid for the same. The pauper accordingly erected a cottage at an expence of more than 30*l.* on the said piece of ground, and some months afterwards applied to the lord for a piece of ground for a garden. As to that the following entry was produced: "24th March 1806. At a special court baron then held, it was certified by the steward, and presented by the homage, that at the then last court the lord of the manor granted licence, &c. (reciting the former entry,) and at this court the lord of the manor granted licence to the said *B. Brad* to inclose a piece of ground for a garden adjoining

joining to the said cottage containing — roods." No consideration was paid for this last piece of ground, and both were severally parts of the waste of the manor, and their value did not exceed 5*l*. After the building of the cottage the pauper resided on the premises about a year and a half, and then sold them to one *Robinson*, of which the following entry was made in the court-rolls: "3d *June* 1809. At a general court baron then held, after noticing that at a court held 9th *Nov.* 1805 licence was granted, &c. (reciting the grant of the first licence); and that at another court held 24th *March* 1806, licence was granted, &c. (reciting the grant of the second licence); it was at this court presented by the homage that the said *B. Brad* had erected the cottage, and inclosed the piece of ground, and that he had since sold and disposed of the same unto *Robinson* for the sum of 40*l.*, whereby happened to the lord an alienation fine of one guinea, which had been paid." Afterwards *Robinson* sold the premises to *Bonham*, of which the following entry was made: "7th *June* 1813. At a general court baron then held, the homage presented that since the then last court *Henry Bonham Esq.* purchased of *Wm. Robinson* a cottage erected on the waste by *B. Brad*, and also a garden adjoining thereto, granted by the lord at courts held 9th *Nov.* 1805, and 24th *March* 1806, whereby there happened to the lord an alienation fine or relief, which had been paid or compounded for: None of these entries were stamped, and this was the only evidence of title produced. There was no evidence that these two pieces of waste land, or either of them, had ever been demised by copy of court-roll, or that there was within the manor of *Orsett* any custom to

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create copyholds, or to grant any part of the waste thereof, to hold as in the nature of copyhold.

The Court desiring to hear the counsel against the order of sessions,

Knox and *Trollope* argued that the pauper took such an interest in the land under the licence granted to him to build, as entitled him to reside on it irremovably, upon the common law principle that a man shall not be disseised of his own; and therefore he acquired a settlement by forty days residence. That some interest passed is plain from the copy of court-roll; and if the land be demisable by copy of court-roll it is sufficient, it need not be demised time out of mind (*a*); and therefore a grant by copy of court-roll of a parcel of the waste within a manor, which does not appear to have been granted by copy of court-roll before, may be good to confer a settlement. (*b*) Admitting however that the pauper had not a legal interest; yet the mere suffering him to build on the land was an acknowledgment that he had some interest; as if a man, without any conveyance executed, should stand by and see another build on the land, he would be told by a court of equity that he could only resume the possession on certain terms. (*c*) And it is unreasonable, that after a party has been led to incur expence in consequence of having obtained a licence from another, that the other should be permitted to recall his licence, and treat him as a trespasser; for which reason it is laid down that a licence executed is not countermandable, but only when it is executory. (*d*) And here it is executed.

(*a*) *Co. Lit.* 58. b.

(*b*) *Rex v. Warblington*, 1 *T. R.* 241.

(*c*) See *Ld. Kenyon C. J.* in *R. v. Butters*, 6 *T. R.* 556.

(*d*) 8 *East*, 310.

Lord

LORD ELLENBOROUGH C. J. A licence is not a grant, but may be recalled immediately; and so might this licence, the day after it was granted. We cannot take into our consideration what it may be conjectured a court of equity would determine in this case. Perhaps a court of equity might interfere, but can we say with certainty that it would? We ought to see that the party has clearly an equitable interest, and not merely such a claim as might possibly induce a court of equity to interpose in some way or other. This was a mere personal licence, and not like one of the cases cited, a grant by copy of parcel of the land. (a) Here the pauper never had a more perfect estate than the licence gave him, that is, a permission to occupy.

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BAYLEY J. We cannot know how a court of equity would deal with this case; probably the utmost that it would do would be to grant an injunction if an ejectment was brought. But here is no grant of any interest in land; I cannot say that the pauper took any estate; and therefore this would be a new species of settlement.

Order of Sessions confirmed. (b)

Pooley and *Walford* were in support of the order of sessions.

(a) *Rex v. Warblington*.

(b) *Le Blanc J.* was absent.

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Friday,
Feb. 9th.MORRIS and Others, Assignees of SMITH and
Others, Bankrupts, *against* CLEASBY.

Where defendant purchased, as broker for *B.*, the goods of *A.*, for whom he sold them under a *del credere* commission, and did not disclose at the time the name of *A.*, but disclosed it soon after, and afterwards paid *A.* the price: Held that in an action by the assignees of *B.* to recover the balance due upon a resale of the goods made by defendant on account of *B.*, defendant was not entitled to set off either under stat. 2 G. 2. c. 22. s. 13. or 5 G. 2. c. 30. s. 28., the payment made to *A.*

ASSUMPSIT for not rendering to the bankrupts an account of the sale of goods delivered by them to the defendant to sell, and sold by him. Money counts. Plea, non assumpsit, with a notice of set-off.

At the trial before Lord *Ellenborough* C. J. at the sittings after *Trinity* term 1814, a verdict was found for the plaintiff for 1090*l.* 7*s.* 8*d.*, subject to the opinion of the Court on the following case:

In *October* 1810 the defendant, a broker in *London*, advertised for sale by public auction, on the 23d of that month, several lots of casks of spirit of turpentine, under certain printed particulars and conditions; one of which was, that the lot or lots should be cleared at the buyer's expence in fourteen days from the date of sale, and the remainder of the purchase-money to be paid on delivery in approved bills at two months, allowing 1½ per cent. discount. On the morning of the sale the bankrupts, who were merchants in *London*, wrote to the defendant, directing him, —

“ Provided the 88 casks of turpentine he had for sale that day could be exported duty free, to buy a part or the whole for their account, at or under 96*l.* duty included. That they expected however he would put them down at the next advance above the highest real bidder, and that such advance would be below the above limit.”

On

On that day the defendant purchased at the sale for the bankrupts 66 casks, and delivered them the following contract :

London, 23d October 1810.

Bought this day by order of Messrs. *Smith, Chesmer, and Down*, at my public sale, 33 lots, 66 casks spirit of turpentine, per prices and particulars at foot. — Revenue, tare and dft. — To be cleared in 14 days, and to be paid for in approved bills at two months, allowing 1s. $\frac{1}{4}$ per cent. discount.

(Signed) *Stephen Cleasby*, Broker.

This sale-note was delivered by the defendant to the bankrupts on the next day, and the following account or bill of parcels was also delivered :

London, 23d Oct.
1810.
6th Nov.

Messrs. *Smith, Chesmer, and Down*,

Bought at *Stephen Cleasby's* public sale,

Sixty-six casks of turpentine	-	£ 1094	9	4
Less 1 $\frac{1}{4}$ per cent. discount	-		13	13 7
			<hr/>	<hr/>
			1080	15 9
Brokerage for buying $\frac{1}{2}$ per cent.	-		5	9 5
Lot money	-		4	2 6
			<hr/>	<hr/>
		£ 1090	7	8

The bankrupts did not know at that time to whom the 66 casks of turpentine belonged, the name of no principal being disclosed to them, and they knew in the purchase only the defendant. Afterwards, about the 6th of *November*, they gave instructions to the defendant for shipping the turpentine, upon which occasion some arrangement respecting the shipping being

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to be made, the defendant for the first time communicated to the bankrupts that the turpentine belonged to *Le Mesurier* and Co., and referred them to *Le Mesurier* and Co. to get the necessary documents for shipping the goods. The bankrupts however afterwards altered their intention of shipping the turpentine, and determined to re-sell it here, and gave instructions to the defendant, as their broker, to sell it on their account, and the defendant sold it accordingly, received the proceeds, and afterwards rendered an account of the sales to the bankrupts. The defendant had been employed by *Le Mesurier* and Co. to sell the turpentine for them as their broker, acting under a *del credere* commission, and on the 2d of *February* 1811 he paid them the amount, viz. 1090*l.* 7*s.* 8*d.*, but had no directions from the bankrupts either to guarantee the payment, or to pay the money to *Le Mesurier* and Co.; neither was the *del credere*, or the payment, made with their knowledge or consent, nor did they know of the *del credere* until long after the turpentine had been re-sold by the defendant on their account. The bankrupts stopped payment on the 10th of *January* 1811, and on the 28th of *February* a commission of bankruptcy was issued against them, under which the plaintiffs were chosen assignees. The sum claimed by the plaintiffs was 1152*l.* 4*s.* 4*d.* as the balance due from the defendant upon the re-sale of the turpentine; against which the defendant claimed to set off the payment made by him to *Le Mesurier* and Co.

And the question was, whether the defendant is entitled to set off such payment; if he be, then such payment will settle the account between the parties,

and the verdict must be for the defendant ; but if otherwise, then the verdict to stand for 1090*l.* 7*s.* 8*d.*

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This case was argued in last *Trinity* term by *Reader* for the plaintiffs and *Comyn* for the defendant. For the plaintiffs it was argued in substance thus :

The defendant is at liberty to set off this sum as the price of the turpentine, if he is to be considered as having sold them to *Smith* and Co. in the character of a principal ; *aliter* if he is to be considered as having purchased them in the character of broker on their account. That he acted as broker and not as principal is plain, as well from the order given him by *Smith* and Co. and the sale note signed and delivered by him, as broker, as from the bill of parcels which contains a charge for brokerage. And if there had been a contemporaneous disclosure of the name of the principal to whom the goods belonged, this case would have differed in no respect from other cases, in which it has been adjudged that the broker could neither detain the goods as upon a stoppage *in transitu*, nor had a lien on them for the money paid, nor a set off. (a) It is true the disclosure was not made until afterwards, but as it was made before any thing intervened to change the rights of the parties, it is the same thing as if it had been made at first. And as to the *del credere*, it is a mistake to suppose that any agreement between a broker and one of his employers, can operate to abridge the rights of another of his employers, who is a stranger to it, and, as to him, place the broker in the situation of principal, where by the course of his dealing he never assumed to act as principal ; a

(a) *Gurney v. Sharp*, 4 *Taunt.* 242. *Cumming v. Forrester*, ante, vol. i. 494.

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del credere being nothing more than a guarantee by the broker to the particular employer for the solvency of person who shall buy the goods, by which the employer acquires the additional security of his broker. Therefore it has been determined that a *del credere* commission does not give to the broker any right of set off against a third person who is ignorant of it, unless he has dealt with such third person as principal. (a) And if this defendant has no right under the statute of set off (b), which regards mutual debts, neither has he any under the statute (c) which extends to mutual credit, because there is no mutual credit, in this transaction, if there was no privity between Smith and Co. and him as principal.

For the defendant it was argued that the *del credere* placed him in the situation of a principal. For a *del credere* commission is an agreement between the broker and his employers that they shall look to him for the price, and in return he shall be considered as owner of the goods. Therefore he is liable to his employers for the price whether he has received it or not. And so if he sell in his own name, he is to all intents, as between him and the vendee, the principal. (d) It is true his employers may interpose between him and the vendee, and the vendee will afterwards act at his peril, if he pays the broker, but until that time the broker is to be considered as principal, and may sue the vendee for the price, though the goods are known to be the property of a third person (e); or if the vendee be sued by the principal for

(a) *Koster v. Eason*, ante, vol. ii. 112.

(b) 2 G. 2. c. 22. s. 13.

(c) 5 G. 2. c. 30. s. 28.

(d) *Houghton v. Matthews*, 3 B. & P. 489. per *Chambre J.*(e) *Williams v. Millington*, 1 H. Bl. 81.

the price, he may set off any demand he has against the broker (a); or the broker himself if he be sued shall likewise have a set off. (b) All which shows that he is to every intent the owner. And as to the two cases cited *contra*, they afford the clearest distinction, because in them the name of the principal being disclosed in the first instance, there never was any contract between the vendors and the broker as principal.

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LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

The pleadings and facts are stated so shortly, and so well in the case delivered to the Judges, that they cannot be abridged. The point to be decided is a simple one, namely, can this claim of the defendant be allowed either as a set off, or under the statute of 5 Geo. 2. The case varies from that of *Grove v. Dubois*, 1 T. R. 112. in this, that the sale was made by the defendant as a broker, and that the principal was disclosed before any transaction on which the defendant's claim is founded, took place. The defendant charges commission, which he ought not to have done if the goods were his own, and the sale note is signed *Stephen Cleasby*, Broker, noticing the sale as made at his public sale. It is clear therefore that he was selling the goods of another person at such his public sale, though that person was not then named. The goods were to be delivered in fourteen days, and paid for on delivery in approved bills at two months; there was no need to name the principal till these fourteen days were

(a) *George v. Claggett*, 7 T. R. 359.

(b) *Groves v. Dubois*, 1 T. R. 112. *Dize v. Dickason*, *ib.* 285. *Wienholt v. Roberts*, 2 Campb. N. P. C. 586.

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expired. On their expiration, (the 6th of *November*, when the goods were to be cleared) the documents for the shipment were to be procured; the defendant then tells the bankrupts that the goods belong to the *Le Mesuriers*, and refers them to that house for the documents. This is an important date in the transaction; the bankrupts were then in credit and continued so for a month afterwards: the defendant wished to have no trouble about the shipment. The disclosure is made, but the goods were not shipped, and nothing appears to have been said or done either by the defendant, or the *Le Mesuriers*, respecting the stipulated mode of payment. The question between the parties is, did this disclosure make the bankrupts debtors to the *Le Mesuriers*, and take away from the defendant the power of paying the *Le Mesuriers* so as to establish the present claim. The assignees say it did, and rely on the ordinary legal rights and obligations of principal and factor in cases where the principal is known. The defendant contends it does not, and relies on his commission *del credere* as his authority, though that was not known to the bankrupts till after the defendant had resold the goods on their account. Whether the bankrupts after the disclosure of the principal, might or might not, if they had known of the commission *del credere*, have paid the defendant safely, is not material to the point now in dispute, nor whether the *Le Mesuriers* could or could not have prevented their so doing. In fact the bankrupts did not for a long time know of the commission *del credere*, and the *Le Mesuriers* did not interfere. We think that this case must be considered as if the principal had been disclosed at the sale. The existence of some other person as principal than the defendant was in effect then disclosed. From the nature

nature of the contract it was not likely that any thing should intervene, which could vary the situation of the parties, or affect their obligations and rights between the day of sale and day of delivery. In fact nothing of that kind did happen, and the principal being disclosed before delivery, before payment, and before any steps could be taken either to remove the goods, or to carry into effect the mode of payment stipulated for, we are of opinion that the principal comes into his entire unabridged rights, and that the several parties are under the same obligations to him as if his name had appeared on the face of the contract. If this be so, the case of *Gurney & al. v. Sharpe*, 4 Taunt. 242. is a strong authority to shew that the defendant cannot support his claim. In that case the factors had not a commission *del credere*, but were liable to the vendors under a special guarantee, the effect of which will be spoken to presently. And the buyers had accepted a bill drawn by the principals for the price at the credit stipulated for, which they had proved under the commission of bankrupt. This shewed that the sellers in that case meant to resort to the buyer in the first instance, as the *Le Mesuriers* might undoubtedly have done here; but the question was there, whether the factor by taking up that acceptance after the credit expired could acquire the right of holding the goods, and so paying himself 2cs. in the pound at the expence of the other creditors of the bankrupt. Here the question is whether the defendant by a voluntary payment made after the stipulated time for credit expired can acquire a right of set-off, or a right under the 5 G. 2., which will have the same effect? The point to be decided is the same in both cases. We think it was properly

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properly decided in *Gurney v. Sharpe*, and that that determination governs the present case. This Court gave some intimation of their opinion on this point in *Cumming v. Forester*, 1 *Maule & Selw.* 494., but as the judgment in that case was put on another point we only refer to it. The defendant relies on his commission *del credere*, or rather on some expressions, which have at different times been reported to have been used by Judges of great name, on the effect of such a commission. In correct language a commission *del credere* is the premium or price given by the principal to the factor for a guarantee, it presupposes a guarantee. It is precisely stated in *Cumming v. Forrester*, 1 *M. & S.* 495., “ That the defendants in that case at the time of effecting the said policies for *Hill* guaranteed the solvency of the plaintiff and other underwriters on the policies to *Hill*, and sent the policies to *Hill* with their guarantee indorsed thereon, and charged and were allowed by him a *del credere* commission upon them.” This term, however, commonly, though incorrectly, is used to express the guarantee itself. But whatever term is used, the obligation of the factor is the same; it arises on the guarantee. The guarantor is to answer for the solvency of the vendee, and to pay the money, if the vendee does not; on the failure of the vendee he is to stand in his place, and to make his default good. Where the form of action makes it necessary to declare upon the guarantee, application to the principal must be stated on the record. In all cases it must, if required, be proved, though in the case of a foreigner very slight evidence may be sufficient. Lord *Mansfield* is made to say in *Grove v. Dubois*, 1 *T. R.* 112. “ That a commission *del credere* is an absolute engagement to the principal from

the broker, and makes him liable in the first instance, that there is no occasion for the principal to communicate with the underwriter, though the law allows the principal for his benefit to resort to him as a collateral security." Some expressions nearly similar, and probably founded on them, have fallen from other Judges in *Houghton v. Matthews*, 3 Bos. & Pull. 489. With all the respect which is due to Lord *Mansfield* and those Judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law on this subject. The laxity of practice mentioned by Mr. Justice *Buller* in *Grove v. Dubois* may have prevailed, as in the case of a foreign buyer the broker is most probably the agent of that buyer, and the principal is seldom inquired after. But such practice cannot alter the legal rights of parties arising on the instrument or terms of their contract. The principal must always be debtor, and that, whether he is known in the first instance or not, except where the broker has by the form of the instrument made himself so liable. Upon the whole, we are of opinion, that the claim made by the defendant in this case cannot be supported, and that the verdict must stand for 1090*l.* 7*s.* 8*d.* The same principle with what is here laid down has been before recognized by us in the case of *Koster v. Eason*, 2 M. & S. 119.

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An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution be under such condition as to make it uncertain whether the assured may not have to pay more than its worth: as where a ship insured from *Liverpool* to *Sierra Leone*, was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and was carried to *Fayal*, where proceed-

ceedings were instituted in the Admiralty Court, and sentence was pronounced in favour of the assured; but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept, and afterwards the remainder of her cargo was sold at *Fayal*, and the law expences paid thereout, and the rest left as a deposit to answer the event of the appeal, in order to obtain the release of the ship, and afterwards the ship returned to *Liverpool*: Held that the assured might recover as for a total loss in an action brought after the ship's return to *Liverpool*.

ASSUMPSIT upon two policies of assurance on the ship *Tartar*, valued at 3000*l.*, at and from *Liverpool* to *Sierra Leone*; and the plaintiff declares in three counts as for a total loss; in the 1st, by capture; in the 2d, by arrest, restraint, and detainment of the persons exercising the powers of government at *Fayal*; and 3dly, by capture, barratry of the mariners, and arrest, &c. of the government at *Fayal*; and alleges in each count, that he had incurred further expence in suing, labouring, and travelling for the recovery of the ship. Money counts. Plea *non assumpsit*; and the defendant paid 35*l.* 13*s.* 4*d.* per cent. into court. At the trial before *Bayley J.* at the summer assizes at *Lancaster* 1814, there was a verdict for the plaintiff for an average loss, with liberty to him to move to enter a verdict for a total loss, if the Court should be of that opinion. And upon its being moved for that purpose, the Court directed a special case to be made, which was this:

The two policies, comprising the usual risks and provisions, were made by the plaintiff and subscribed by the defendant on the 11th and 16th of *December* 1813, upon the ship and voyage mentioned in

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the declaration. On the 29th of *December* the *Tartar*, with a cargo intended for barter on the coast of *Africa* for the produce of that country, sailed from *Liverpool* on the voyage insured, manned with twenty mariners, and carrying sixteen guns. On the 31st of *January* 1814, in her course to *Sierra Leone*, she was captured by a *French* frigate. The captors took on board the frigate the captain of the *Tartar*, and fourteen of her crew, and plundered or threw overboard a considerable part of her cargo, the greater part of her stores, provisions, and water, thirteen out of sixteen great guns, all her small arms, and all her ammunition, her long boat, instruments, register, and all her papers, except the log-book. The *French* commander then gave her up thus plundered to the master of a *Portuguese* schooner, which he had previously captured and burnt, putting on board the captain of the *Tartar* and fourteen of his crew, fourteen other *British* sailors, the *Portuguese* captain, and twenty-one of his crew. The *French* commander ordered the *Portuguese* captain to make for the nearest land, which was *Buona-Vista*. The *Tartar* was left by the frigate very short of provisions and water, and with only an old chart and quadrant, and in this state reached *Buona-Vista* on the second day after she parted from the frigate, where she took in such provisions and water as could be procured by bartering part of the cargo left on board by the *French*. After staying one day at *Buona-Vista* she sailed for *Madeira*, but the crew being ungovernable, and often drunk, rose and insisted on going to one of the western islands, and she accordingly sailed for *Fayal*, and arrived there on the 21st of *February*. There was no discipline on board, but such command as there was, was exercised by the

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captain of the *Tartar*. As soon as she reached *Fayal* the *Portuguese* master laid claim to the vessel, and to what remained of the cargo as his property, in consequence of the donation of the *French* commander, and instituted proceedings in the ordinary court there. A few days after her arrival the ship and cargo were seized under a written warrant from the court, and *Portuguese* colours hoisted. The *Portuguese* master petitioned to land the cargo in order to sell a part for the support of himself and crew, they being then out of all provisions and water. This claim the captain of the *Tartar* resisted, but the ship was detained at *Fayal* during the proceedings in the admiralty court there. On the 10th of *March* the captain of the *Tartar* wrote to the plaintiff to communicate the then state of affairs, and added that he had leave to land the remaining part of his cargo, and to sell it for the benefit of those whom it might ultimately concern, and that he hoped all would soon be settled. On the 1st of *April* sentence was pronounced by the Court in favour of the captain of the *Tartar*; against which sentence the *Portuguese* master insisted on appealing. The letter written by the captain of the *Tartar* on the 10th of *March* reached the plaintiff on the 4th of *April*, and the plaintiff immediately communicated it to the defendant, and the other underwriters, and gave them notice that he abandoned to them the ship and cargo, and demanded a settlement as for a total loss, which abandonment the defendant and the other underwriters refused to accept. The remaining part of the cargo was landed and sold at *Fayal*, and the disbursements of ship and crew, and the law expences, were paid thereout, and the remainder the captain of the *Tartar* was obliged to leave in the hands of a *Portuguese*

tuguese to answer the *Portuguese* master's farther appeal, in order to obtain the release of his ship. From the loss of her cargo, and the other causes, and the want of stores which could not be procured at *Fayal*, the original voyage became impracticable. On the 11th of *May*, and not before, the captain of the *Tartar* got possession of the ship, and on the 12th she sailed from *Fayal* for *Liverpool*, and arrived at *Liverpool* on the 29th. When she left *Fayal*, she could not have been sold there for more than 600*l.*, but was worth, to be sold in *Liverpool*, 1300*l.* The expence of navigating her from *Fayal* to *Liverpool* was 221*l.* The sum deposited at *Fayal* was 427*l.* 18*s.* 9*d.*, which is to abide the event of the appeal. The appeal is against the sentence ordering restitution of the ship and cargo to the captain, and this appeal is still pending. The writ in this action was sued out on the 3d of *June* 1814. The money paid by the defendant into court is more than sufficient to pay his proportion of the loss, supposing it to be an average loss.

The question for the opinion of the Court is, whether the plaintiff is entitled as for a total loss. If the Court should be of opinion that he is, the rule to be absolute; if otherwise, the rule to be discharged; with liberty to turn the case into a special verdict.

This case was argued in last *Trinity* term by *Joy* for the plaintiff, and *Richardson* for the defendant. For the plaintiff it was argued, 1st, that this was a total loss at the time of abandonment. For at that time the ship was captured, plundered, dismantled, and given away; stripped of her cargo, stores, provisions, arms, ammunition, charts, and instruments, without the possibility of

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replacing them; no part of her trading performed; the renewal of her voyage impracticable; the ship itself in the possession of a foreigner; every thing gone but the hull, with little probability of its being restored, except at a ruinous expence. And if all these circumstances combined do not amount to a total loss, what is it that shall constitute a total loss, to entitle an assured to abandon? 2dly, If the abandonment was well made, the plaintiff's right to recover shall not be defeated by subsequent events. For by the abandonment the plaintiff acquired a right to enforce his indemnity from the underwriter presently, because an abandonment is in the nature of a present demand; and "as a present demand cannot properly be made without a present right, if there is a present right there is a corresponding obligation to accede to it *de præsenti*." (a) It is true that "to authorize an abandonment there must be actually a total loss, or in the highest degree probable, at the time of abandonment (b);" but the right of action does not depend on the abandonment's being accepted, but only upon its being properly made. For all the foreign jurists agree that abandonment once made on valid grounds is irrevocable by both parties. Thus *Guidon* (c), "a ship arriving at a port of safety after abandonment made, must belong with all her profits to the underwriters;" and in the terms of *Valin* (d), "by reciprocity of reason after abandonment declared the assurer cannot under pretext of the return of the vessel dispense with paying the sum insured." So *Emeri-*

(a) Per Lord Eldon C., *Smith v. Robertson*, 2 Dow. 474.

(b) Per Lord Ellenborough C. J., *Anderson v. Wallis*, antc, vol. i. 240.

(c) G. 7. art. 12.

(d) Art. 60.

gon (a), "My ship is taken; I have abandoned; it is released by the captor, or otherwise regains its liberty; my underwriters are entitled to the benefit of such abandonment without any power in me to deprive them of it under pretext of the return of the vessel. By identity (*identité*) of reason I have a right to compel them to the payment of the sum insured, without any power in them to defend themselves under the same pretext." And it is added, "Abandonment once made is irrevocable." Also *Pothier* (b), "Abandonment transfers the property irrevocably to the underwriters;" and *Guid.* (c), "It is equivalent to a transfer;" and *Valin* says (d), "I cannot abandon a ship captured on condition that if re-captured she shall still belong to me;" and again, "After abandonment declared (*signifié*) the effects insured belong to the assurer (e);" and *Emerigon*, referring to *Valin*, adds, "This transfer of property is of the very essence of abandonment." Thus it appears that the time of abandonment, and not the time of action brought, is the period to determine the right of the assured to recover for a total loss; and it was resolved in *Dom. Proc.* that an assured may abandon notwithstanding the ship is in safety for the benefit of the owners. (f) *Bainbridge v. Nielson* (g) was decided upon the ground that the assured abandoned under a mistake of fact; so that the abandonment was not well made, and the ship afterwards arrived and earned her freight. Also granting that an unconditional restitution of the ship might have made a difference, there is

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(a) *Traité des Assur.* c. 17. s. 6., where note that the reference to *Poth. Traité du Contrat d'Assur.*, No. 138. ought to be No. 135.

(b) *Traité du Contrat d'Assur.*, No. 35.

(c) *G. 7. art. 3.*

(d) *Art. 47.*

(e) *Art. 60.*

(f) *Smith v. Brown*, 1 *Dow.* 349.

(g) 10 *East*, 329.

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nothing like it in this case, for *non constat* at this moment that the assured will succeed in the appeal; and the restitution is fettered with a pledge dependent upon the result of the appeal.

For the defendant, it was denied that the abandonment was well made. For after the capture, the ship was again resumed by her crew, and the captain had the command of her; and as to the donation made by the *French* commander, it cannot be supposed that this conferred any right, and so the court at *Fayal* determined; and though an appeal has been made against this determination, and a deposit required of the assured, it never can be presumed that the result of that appeal will be contrary to all justice, so as to bring the deposit into hazard. And the captain so far from considering it a total loss writes that he hoped all would soon be settled. But in order to warrant an abandonment the assured must be ousted of his possession in such a way as to be in its nature permanent; and therefore an embargo is not necessarily a good cause of abandonment. (a) And here the detention was temporary, viz. to abide the event of the *Portuguese* master's claim, and the ship has since been liberated, and arrived at her port, and the defendant has paid his proportion of the actual damage. And if at the time of bringing the action, the plaintiff has been indemnified, what pretence has he for maintaining it? As if a creditor insure the life of his debtor, to the extent of his debt, and after the death of the debtor, is paid the debt, he cannot recover against the underwriter. (b) Or if that which is in its inception a temporary loss, turn out subse-

(a) See *M'Carthy v. Abel*, 5 East, 388.

(b) *Godsall v. Boldero*, 9 East, 72.

quently,

quently, and before action brought, to be only a partial loss, the assured shall not by reason of his abandonment, while the loss was temporary, be entitled to recover as for a total loss. (a) As to *Smith v. Brown*, perhaps it was considered that the ship was held for the benefit of all parties; if not so, it seems contrary to *Parsons v. Scott* (b) and other cases.

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Cur. adv. vult.

LORD ELLENBOROUGH C. J. on this day delivered the judgment of the Court.

This was an action upon two policies of assurance underwritten by the defendant on the ship *Tartar*, brought to recover a total loss, and the question upon the facts stated in the case is, whether the plaintiff is entitled to recover as for a total loss, or whether it be an average loss only. (Here his Lordship stated the case.) It has not been disputed, nor can it with any colour of argument be contended, that on the 4th of *April* 1814 there was not a sufficient ground for the abandonment of the ship, which was on that day made to the underwriters. The ship had been captured, plundered of thirteen out of sixteen of her guns, and of her stores, and possession of her was not restored till afterwards, i. e. on the 11th of *May* 1814. But it has been argued, that as a contract of assurance is a contract of indemnity, therefore the nature of the damnification at the time when the action is brought is to be regarded as the criterion of the right to recover as for a total loss; and if at that time what had antecedently been a total loss had by subsequent events ceased to be so, and had

(a) *Bainbridge v. Neilson*, 10 *East*, 320.

(b) 2 *Taunt.* 365.

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become an average loss merely, that a compensation as for an average loss could alone be recovered; and the case of *Godsall v. Boldero*, 9 *East*, 72., principally decided upon the authority of Lord *Mansfield* in *Hamilton v. Mendez*, as to this point, and the case of *Bainbridge v. Neilson*, 10 *East*, 329., were cited for this purpose. But in the former of those cases all cause of damnification had ceased before the action brought, and in the latter (which was an action as for a total loss upon a capture and abandonment as here) there was an entire restitution of the ship insured in an undamaged state, and she afterwards earned her freight; so that all pretence of total loss with reference to the time of bringing the action had in that case ceased. Here the guns and stores taken out of the ship were never restored, her voyage was completely lost, and the ship itself was never fully liberated and restored but upon an actual deposit of a large sum, viz. 427*l.* 18*s.* 9*d.* to abide the event of the appeal as to the entire right of the property in the ship itself, and subject to the risk not only of the plaintiff's losing that deposit, but of being condemned in damages to a much larger and indefinite amount. Under these circumstances what can be said to be the limit of the plaintiff's loss? If it is an average loss, who can state the amount of such average? And if not a total loss, by what circumstance and to what amount is it placed below that standard? The mere restitution of the hull, if the plaintiff may eventually pay more for it than it is worth, is not a circumstance by which the totality of the loss is reducible to an average one. If no abandonment had been already made, do not sufficient circumstances exist in this case to warrant an original abandonment at the present moment? The

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voyage is lost; the cargo which was to be conveyed in the ship, is wholly gone; she is stripped of a great part of her necessary equipment, stores, and furniture, and the ultimate recovery of any thing is uncertain, and attended with the trouble, expence, and hazard of litigation. And can it be said that the effect of an abandonment, unquestionably competent to have rendered the loss a total loss recoverable as such at the time it was made, can be frustrated and disappointed by the continuance in part of the same, and the occurrence in part of other accessory causes of loss of a similar kind? It appears to us that there existed at the time of the abandonment, at the time of the action brought, and that there continue to exist at the present moment, circumstances fully sufficient to entitle the plaintiff to recover as for a total loss.

Rule absolute.

RAMSBOTTOM and Others *against* HARCOURT
and BAWDEN.

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BAWDEN, an attorney of this court, was arrested upon a latitat, and gave bail to the sheriff in a suit by bill brought against him and *Harcourt* jointly, *Harcourt* having privilege of parliament. And upon a rule nisi that the bail-bond might be delivered up to be cancelled, and common bail filed, the question was, whether in this case *Bawden* should be allowed his privilege, where he was sued jointly with one who is privileged; it being contended on his behalf that an attorney only loses his privilege, where he is sued with another who is not privileged. And *Roberts v. Maser* (a) was cited.

An attorney
sued by bill
jointly with a
person having
privilege of
parliament,
does not lose
his privilege.

(a) 1 Taunt. 254.

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The Attorney-General and Comyn, who shewed cause, referred to *Tidd's Prac.* (a) for the rule, that an attorney shall not be allowed his privilege, where he sues or is sued *en autre droit*; or jointly with his wife or other person who is not privileged. And though in this case the person with whom *Bawden* is sued has privilege of parliament, yet if the plaintiffs had sued by original, *Bawden* clearly would not have been allowed his privilege; and the rule seems to be that wherever a different remedy from that in which an attorney is entitled to his privilege lies against him jointly with another, there he shall not be allowed his privilege.

The Court agreed, that where an attorney is sued jointly with a person not privileged, he shall not be allowed his privilege. But they inquired if there was any authority to the same effect, where an attorney is sued with a privileged person. And it being admitted that there was not any such authority, they said that in the present mode of proceeding *by bill* the attorney was intitled to his privilege.

Rule absolute. (b)

Peake and *Casberd* were in support of the rule.

(a) 76.

(b) See 2 *Imp. Pr.* 568. 7th edit.

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1. **T**HE trustees of a public road, who were empowered and required by act of parliament to place lamps along the road, if they should think necessary, and to make contracts for the cleansing of the road, and to take a night-toll for the purpose of enabling them to light and watch the same, were held not liable in an action upon the case for an injury suffered by an individual in crossing the road at night, by falling over a heap of scrapings left on the road-side, after cleansing the road, without any lights. *Harris and Wife v. Baker, E. 55 G. 3. Page 27*
2. Where plaintiff declared that before and at the time of committing the grievance, he was navigating his barges laden with goods along a public navigable creek, and that

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defendant wrongfully moored a barge across, and kept the same so moored, from thence hitherto, and thereby obstructed the public navigable creek, and prevented the plaintiff from navigating his barges so laden, per quod plaintiff was obliged to convey his goods a great distance over land, and was put to trouble and expence in the carriage of his goods over land: Held that this was such a special damage for which an action upon the case would lie. *Rose and Others v. Miles, E. 55 G. 3. P. 101*

AFFIDAVIT,

See ERROR, WRIT OF. QUO WARRANTO.

Affidavit of debt, "that defendant is indebted to plaintiff in 6000*l.* upon a bond, bearing date, &c. and made and entered into by defendant to plaintiff in the penal sum of 25,000*l.*" without shewing the condition of the bond, is insufficient; and the Court discharged defendant

ant on common bail. *Bosanquet and Others v. Fillis*, T. 55 G. 3.
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1. Where a verdict was given for a sum exceeding the damages in the declaration, and judgment entered for the same, and writ of error upon the judgment assigning that for cause, the Court allowed the plaintiffs to amend the judgment and transcript in a term subsequent to that in which the judgment was signed, by entering a remittitur for the excess. *Usher and Another v. Dansey and Others*, E. 55 G. 3. 94
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An appeal does not lie to the quarter sessions against an order for relief. *The King v. The Justices of Devon*, M. 56 G. 3. 421

APPOINTMENT,

See OVERSEERS.

ARMY.

In trespass against the adjutant of a regiment of local militia for arresting and imprisoning a serjeant in the same regiment, upon a charge of unsoldier-like conduct in exciting disobedience and mutiny, it is a good defence upon the general issue that the action was not brought within six months after

ASSUMPSIT.

the fact committed; but if the imprisonment is continued by defendant, in pursuance of orders from the commanding officer of the regiment, to a period within six months, the action lies; unless the continuance of it be justifiable on the part of the commanding officer; and such continuance was held to be justifiable where it was in order to bring plaintiff to a general court-martial for uttering words in the presence of several serjeants and others of the same regiment, amounting to disorderly conduct on the part of plaintiff to the prejudice of good order and military discipline, within the 24th section of the articles of war, art. 2., although the words uttered referred to an order made by the commanding officer, which he was not strictly competent to make, and although plaintiff was acquitted by the sentence of the court-martial. *Bailey v. Warden (in Error)*, M. 56 G. 3. Page 400

ASSUMPSIT.

Where a pauper had his leg accidentally fractured in one parish, and was conveyed to the next house in an adjoining parish, and was confined there and visited by the overseer, and attended by the surgeon who attended the parish poor, with the knowledge of the overseer: Held that the surgeon might have assumpsit against the overseer for the expences of the cure; for there was not any obligation against the parish where the accident happened to pay these expences, and the overseer's knowing of and not repudiating the surgeon's attendance was equivalent to a request. *Lamb v. Bunce*, T. 55 G. 3. 275

ATTOR-

BANKRUPT.

ATTORNEY,

See PRIVILEGE.

ATTORNEY, WARRANT OF,

See PRACTICE, 1.

AVERMENT,

See EVIDENCE, 7, 8.

BAIL,

See ESCAPE.

1. Bail allowed to justify in respect of property, consisting partly of cash and partly of a freehold house at *Gibraltar*. *Beardmore and Others v. Phillips*, T. 55 G. 3. Page 173
2. A native of England was allowed to justify as bail, in respect of property partly in England and partly abroad. *Graham v. Anderson*, M. 56 G. 3. 371

BAIL-BOND,

See PLEADING, 1.

BAIL, RECOGNIZANCE OF,

See SCIRE FACIAS.

BANKRUPT,

See AMENDMENT, 2. PARTNERS, 1.

1. A transfer of a ship and cargo at sea, conveyed by M. to S. as a security for money borrowed, by executing and delivering to S. a bill of sale of the ship, a policy upon ship and cargo, and indorsing the bills of lading, was held not to pass the property to S., where S. neglected, upon the ship's return and notice thereof, to take possession, or to do any act to notify the transfer of the property to him; but that the property passed to the assignees of M., who became bankrupt, as being in the possession, order, and disposition

BILLS OF EXCHANGE. 589

- of M. at the time when he became bankrupt within the stat. 21 Jac. 1. c. 19. Also that an agreement between M. and the captain, that the captain should have one-fifth share of the profit or loss of the voyage on ship and cargo, did not prevent S. from taking possession. *Mair and Others, Assignees, v. Glennie and Others, Assignees*, T. 55 G. 3. Page 240
2. A surety in an annuity deed who is compelled by the annuity creditor after the bankruptcy and allowance of the certificate of the principal to pay several sums for arrears due after the issuing of the commission, is not within stat. 49 G. 3. c. 121. s. 8., and therefore may have an action against the principal for such sums, and hold him to bail. *Welsh v. Welsh and Another*, T. 55 G. 3. 332

BASTARD.

1. Order of filiation on the putative father, stating that the child is likely to become chargeable, held sufficient, without shewing that it was actually chargeable. *Rex v. The Inhabitants of Hartington Upper Quarter*, H. 56 G. 3. 559
2. If the order directs a sum to be paid towards the lying-in and maintenance, it seems to be enough, without stating that the sum was expended by the overseers. And if it be stated to be on complaint of the overseers of a township it need not state that it is a township maintaining its own poor. *ib.*

BILLS OF EXCHANGE.

1. A bill of exchange, drawn in this form: "Pay to our order," &c. signed in the name of two persons and Co., and accepted by defendant, may be declared upon by the indorsees as a bill drawn by an aggregate

gregate firm, and if it be proved that the firm consists of only one person, yet it is not a variance.

Bass and Another v. Clive, E. 55 G. 3. Page 13

2. The drawer of a bill of exchange, who has no effects in the hands of the drawee, except that he has supplied him with goods upon credit, which credit does not expire until long after the bill would become due, is not discharged by want of notice of the dishonour. *Claridge v. Dalton, T. 55 G. 3.*

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3. Time given by the indorsee to the payee does not discharge the drawer. *ib.*

4. Where the holders of a foreign bill of exchange, payable 60 days after sight, presented it to the drawees for acceptance, which being refused, they protested it for non-acceptance, and afterwards, on the day when it became due, presented it to the drawees for payment, making a charge for the expences of protesting it, to which the drawees said, "This bill will be paid, but we cannot allow you for a duplicate protest," and the holders refused to receive payment without the charges, and afterwards the drawees revoked their offer to pay: Held that they might well do so, for this did not amount to an acceptance of the bill by the drawees. *Anderson and Others v. Heath and Others, T. 55 G. 3.* 303

5. A bill of exchange payable at a banker's in London, which, by reason of being mislaid, was not presented for payment, but the acceptor was some months afterwards informed of its being mislaid was held not to be discharged, but that the drawer might set it off in an action brought against him by the acceptor, although the bankers at whose house the bill was pay-

able failed in the interval, and the acceptor had at all times up to the failure of the bankers a balance in their hands sufficient to cover the acceptance. *Sebag v. Abitbol, H. 56 G. 3.* Page 462

6. Where the indorsee declared against the maker of a promissory note, that he made the same payable at the house of Messrs. B. and Co., London, and upon production of the note at the trial it appeared that the address at the house of Messrs. B. and Co. was not a part of the note, but only a memorandum at the foot of the note: Held that this was a variance. *Exon v. Russell, H. 56 G. 3.* 505

BOARD OF CONTROL,

See MANDAMUS, 3.

BOND,

See RELEASE, 2.

In debt on bond, conditioned for the performance of several things, if one of them be void at the common law, yet the bond may be good for the others; as where it was conditioned to pay money to the obligee upon the conveyance of an estate to the obligor, and to present the obligee's son to the next avoidance of a church, the advowson of which belonged to the estate, if he were then of age to take it, or if not, to procure the person who should be presented to resign, upon notice of the son's being qualified to take it, and to present him: Held that admitting that part of the condition for the presentation of the obligee's son to be simoniacal, yet the bond was good for the payment of the money. *Newman, Executor of H. Newman, v. Newman, E. 55 G. 3.*

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BROKER

BROKER AND PRINCIPAL.

Where defendant purchased, as broker for *B.*, the goods of *A.*, for whom he sold them under a *del credere* commission, and did not disclose at the time the name of *A.*, but disclosed it soon after, and afterwards paid *A.* the price: Held that in an action by the assignees of *B.* to recover the balance due upon a resale of the goods made by defendant on account of *B.*, defendant was not entitled to set off either under stat. 2 G. 2. c. 22. s. 13., or 5 G. 2. c. 30. s. 28., the payment made to *A.* *Morris v. Cleasby*, H. 56 G. 3. Page 566

CANTEEN,

See POOR RATE, 2.

CERTIORARI,

See OVERSEERS. SESSIONS.

1. Certiorari granted at the instance of the Attorney-General on behalf of a prisoner to remove an indictment for murder, found against him at the sessions for the city of *Rocheſter*; also a habeas corpus to bring the prisoner into this court. *The King v. Thomas*, M. 56 G. 3. 442
2. An indictment found at the quarter sessions upon stat. 52 G. 3. c. 155. s. 12. for disturbing a religious assembly, may be removed into this court by *certiorari* before trial. *The King v. Wadley*, H. 56 G. 3. 508

CHARTER-PARTY,

See FREIGHT.

Where defendant chartered his ship to the commissioners of the transport service on behalf of the crown, to be employed as a transport, and the ship in the course of such employment made several voyages

from *Deptford* to foreign ports and back, held that by the terms of the charter-party, coupled with the nature of the service, a temporary ownership passed to the crown, so that defendant during the time of such service was not to be considered as owner within the charters granted to the *Trinity-House*, which impose lighthouse duties, and for buoyage and beaconage, on the masters and owners of ships. *The Master, Wardens, and Assistants of the Trinity-House v. Clark*, T. 55 G. 3. 288

CHURCH RATE,

See MANDAMUS, 1.

CODICIL,

See DEVISE, 1.

COPYHOLD,

See MANDAMUS, 1.

COSTS.

1. A suggestion cannot be entered under stat. 23 G. 2. c. 33. in order to entitle the defendant to double costs, after judgment by default and writ of inquiry, but only where there has been a trial. *Harris v. Lloyd*, E. 55 G. 3. 169
2. The sessions before whom a parish is acquitted upon the trial of an indictment for not repairing a highway, may by their order award *C.* and *E.* to pay costs to the parish, although the names of *C.* and *E.* be not on the back of the indictment, and although the indictment originated in a presentment of *A.* and *B.* constables, whose names are on the indictment; and it is enough if the order is intituled as in the prosecution of *C.* and *E.*, without shewing further that *C.* and *E.* are prosecutors; neither need it appear on the face of the order

order that the indictment was tried, if that appear by the record of the proceedings; and the order is good in form if it be for the payment of the costs to the solicitor of the parish. *The King v. Commerell and Ellis*, T. 55 G. 3. Page 203

3. Upon a petition to the House of Commons against the return of a member, and also charging the returning-officer with corruption and bribery, if the returning-officer attend by his counsel and agent before the select committee, and bring witnesses to defend himself against those charges, and the committee report that the charges appeared to them frivolous and vexatious, which resolution is entered in the journals, and the returning-officer obtain the Speaker's order and certificate, pursuant to stat. 28 G. 3. s. 52., ascertaining the amount of his costs and expences, debt lies to recover them. *Trueman v. Lambert and Others*, T. 55 G. 3. 234

4. The costs of a prosecution, in the borough court of *Liverpool*, for a felony committed within the borough, may be ordered by the Court to be paid by the treasurer of the county of *Lancaster*, the borough of *Liverpool* not having exclusive jurisdiction, nor any treasurer like a county treasurer, nor any rate in the nature of a county rate, but contributing as a part of the county to the county rate. *The King v. Johnson*, H. 56 G. 3. 515

COTTON,

See WOOL.

COUNTY RATE.

A charter granting jurisdiction to borough justices over a district not within the borough, without words of exclusive jurisdiction, does not

exclude the county justices from rating the district to a county rate; therefore, where, by charters *Edw. 4.* and *H. 7.* to the borough of *Leicester*, the borough justices have exclusive jurisdiction within the borough, with a non-intromittant as to the county justices; and by another charter, *Eliz.*, all houses, &c. within the parish of *St. Mary*, in *Leicester*, are put under the government and jurisdiction of the borough justices, saving to all persons their rights and jurisdictions: Held that the justices for the county of *Leicester* might well impose a county rate upon a part of the parish of *St. Mary*, which lies within the county, and not within the borough, although a rate in the nature of a county rate had been previously imposed for the same time by the borough justices; and although it appeared that in one instance only in 1684, this part of the parish had contributed to the rate for the county at large, and that from 1768 to the present time rates in the nature of county rates had been assessed upon the parish at large by the borough justices; for before the charter *Eliz.* this part of the parish could not have been contributory to the borough rates, and must have been by law contributing to the county rates, and the charter did not vary the place to which it should contribute from the county to the borough; and though there was no poor rate, or petty constable, or other peace officer for this part of the parish, out of which the rate might be levied by stat. 12 G. 2. c. 29., yet the statute does not on that account transfer the right from the county to the borough justices, and the 44 G. 3. c. 34. s. 9. (local act) supplies any defect which there might be in 12 G. 2. c. 29. to warrant the levy. *Bates v. Win-*

DEBT.

v. Winstanley and Another, M.
56 G. 3. Page 429

COVENANT,

See VARIANCE. WARRANTY.

1. Covenant lies by devisee of lands in fee upon a covenant made by defendant to the testator, to whom defendant conveyed the lands in fee, that defendant was lawfully seised, &c. and had a good right to convey, &c.; for such covenant runs with the land, and though broken in the lifetime of testator, is a continuing breach in the time of the devisee, and it is sufficient to allege for damage that thereby the lands are of less value to the devisee, and that he is prevented from selling them so advantageously. *Kingdon v. Nottle, E.* 55 G. 3. 53
2. Covenant lies by the heir, upon a covenant made to the ancestor and his heirs, to whom lands are conveyed in fee by husband and wife, that he and his wife will make further assurance upon request of the ancestor and his heirs; and the heir may well assign for breach, that his ancestor requested the husband, that he and his wife would levy a fine to pass the estate of the wife legally to him and his heirs, which they refused to do before their decease, per quod after the death of the ancestor the devisee of the wife ejected the heir. *Jones and Another v. King, T.* 55 G. 3. 188

DEBT,

See SHERIFF.

1. Debt does not lie at the common law, nor by stat. 8 Ann. c. 14. for the arrears of an annuity or yearly rent devised payable out of lands to A. during the life of B., to
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- whom the lands are devised for life, paying the same thereout, so long as the estate of freehold continues. *Webb v. Jiggs and Martha his Wife, E.* 55 G. 3. Page 113
2. Debt lies by the assignees of a replevin bond against one of the sureties in the *dictinet* only. And where they declared that at the city of C., and within the jurisdiction of the mayor of the city, they distrained the goods of W. H. for rent, and that W. H. at the said city made his plaint to the mayor, &c., and prayed deliverance, &c.; whereupon the mayor took from him and the defendant, and another person a bond which they all three executed, conditioned for W. H. appearing before the mayor or his deputy at the next court of record of the city, and there prosecuting his suit, &c.; and thereupon the mayor replevied, &c.: Held that it was not ground for special demurrer, that the declaration did not shew a custom for the mayor to grant replevin and take bond, and did not shew that plaint was made in court. *Wilson v. Hobday, E.* 55 G. 3. 120

DEL CREDERE COMMISSION,

See BROKER.

DEPOSITIONS.

See EVIDENCE, 2, 3.

DEVISE,

See WILL. FOREIGN COURT.

1. Devise to J. B. of all his plantations, lands, tenements, negroes, slaves, cattle plantations, stock, utensils, and hereditaments in the island of St. Kitts, to hold to J. B., his heirs, executors, &c., according to the nature and quality thereof,
- R r

thereof, to the use that *W. B.* should have one clear annuity or rent-charge of 150*l.* for his life, to be issuing out of said plantations, &c., and subject to and chargeable as aforesaid to the use of *J. B.*, his heirs, executors, &c. according to the nature and quality of the premises. Codicil, reciting the death of *W. B.*, devised the said annuity to trustees in trust for *M. G.* for life, to be raised out of his said plantations and estates, and paid in same manner and with like remedies as directed in favour of *W. B.* Second codicil revoked that part of first in which he had given to *M. G.* 150*l.* per ann. and instead thereof he gave 20*l.* per ann. to *M. G.* for life. Third codicil revoked that part of the will in which he devised to *J. B.* all his estate and property in *St. Kitts* and declared the same void, and gave and bequeathed the said property to *J. B.* in fee: Held that the annuity given to *M. G.* by the 1st codicil was not revoked by the last codicil, nor reduced by the 2d codicil, the 2d codicil not being executed according to the statute of frauds, which is in force in the said island of *St. Christopher*. *Beckett and Another, Assignees of M. Gould, Widow, a Bankrupt, v. Harden and Another*, *E. 55 G. 3.*

Page 1

2. Devise, 1st, to my wife all my goods, &c. to her and her heirs, also three cow-commons to her and her heirs; 2dly, to my two nephews all that piece of land called, &c., also to my nephews all that piece of land called, &c. as tenants in common, and to their several heirs and assigns for ever; 3dly, "I give to *J. C.* all that my house and premises at *P.* I ALSO give to *J. C.* all that my land in *P.* and *R.* to him, his heirs and assigns for

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ever:" Held that *J. C.* took a fee in the house and premises as well as in the land. *Fenny d. Collings v. Ewestace*, *E. 55 G. 3.* Page 58

3. Devise of lands to *R. D.*, his eldest son, and his heirs; but if it should happen that *R. D.* should die and leave no issue, then to his son *W. D.* and his heirs; and if he should die without issue, then to his son *E. D.*, &c.: Held that *R. D.* took an estate tail. *Dansey v. Griffiths*, *E. 55 G. 3.* 61

4. Devise to his wife and daughter *E.* jointly during his wife's life, and from and after her decease to the use of *E.* for life, and from and after her decease to her first and every other son, according to seniority, and for want of such sons to her daughter or daughters to be equally divided, and if there should be no more than one daughter, to her use; and in default of such issue of his daughter *E.*, to his daughter *M.* for life, then to her first and every other son, subject to the like restrictions and limitations, and for want of such, to the daughter or as many daughters of *M.* to be equally divided; and for want of such, to his daughter *C.* for life, (remainder in like manner); and for want of all such issues, to his own right heirs for ever; Held that the remainder to *M.* and her children was not a contingent remainder defeasible by the event of *E.*'s dying and leaving a daughter, in whom the estate vested; but that such remainder took effect in the children of *M.* upon the death of the daughter of *E.* *Goodright d. Lloyd and Others v. Jones and Others*, *E. 55 G. 3.* 88

5. Devise to his wife for life, remainder to trustees, &c. remainder to his daughter for life, remainder to trustees, &c., remainder to the heirs of her body; and for want of such

such issue, remainder over in fee; it being his will and meaning, that after the decease of his wife, his daughter should have only an estate for life, and that after the decease of his wife and daughter the premises should go to and vest in the heirs of the body of his daughter; and for want of such issue, should go over in fee, and that his daughter should not have any power to defeat his intent: Held that the daughter, notwithstanding, took an estate tail, and barred the remainder over by suffering a recovery. *Roe, dem. Thong v. Bedford*; M. 56 G. 3. Page 362

6. Devise to wife of "all and singular my freehold lands, messuages, and tenements at, &c. or elsewhere together with all my household goods, &c. for life, and after her decease then all the said estates, goods, &c. to be divided among my sons (naming five) share and share alike:" Held that the sons took a fee in the lands after the death of the wife, and that the estate of one of them was well devised to another, by a devise "of all my proportionable share which belongs to me after my mother's death, to him and his heirs. *Roe dem. Allport and Others, v. Bacon*, M. 56 G. 3. 366
7. Devise of testator's reversion to J. N. for life, with power to jointure and raise portions for younger children, remainder to his first and other sons, &c., with power to J. N. and those in remainder during their respective possessions, to make leases of the lands in *Sussex* and *Huntingdonshire* for not exceeding 21 years, at the most rent; and of the lands in *Middlesex* and *London* for not exceeding 61 years at the usual or other the most rent: Held that J. N. might well lease the lands in *Middlesex* upon a fine, and at a reserved rent, which rent

exceeded the rent reserved upon a former lease in being at the date of the will, and at the testator's death, and upon which lease the then lessor had also taken a fine. *Doe, d. Newnham and Another v. Creed*, M. 56 G. 3. Page 371

8. Where T. T. was seised of a messuage and lands in a parish, and in two hamlets of the same parish, which he purchased of L., and let to a tenant at one entire rent, and afterwards other lands were allotted to him under an inclosure act, in lieu of the said lands, except the messuage and two acres, which remained as before, all which the tenant continued to hold at the same rent as before; and afterwards T. T. devised all his messuage, farm, and lands, &c. situate in one of the two hamlets by name, in the said parish which he purchased of L.: Held that the lands in the other hamlet did not pass; and that evidence *dehors* the will to shew that he intended to pass all the lands which he purchased of L. was not admissible. *Doe d. Tyrrell v. Lyford and Another*, H. 56 G. 3. 550

DILAPIDATIONS.

The successor may have separate actions against the executor of the late rector, for dilapidations to different parts of the rectory: *Young v. Munby*, T. 55 G. 3. 183

EAST-INDIA COMPANY,

See MANDAMUS, 3.

EJECTMENT.

1. The lessor of the plaintiff in ejectment cannot release the action. *Doe, dem. Byne and Others, v. Brewer and Another*, T. 55 G. 3. 300
2. A third person cannot defend as landlord upon the trial of an ejectment,

ment, where it appears that the tenant in possession came in as tenant to lessor of plaintiff, and paid rent to him, under an agreement that has expired. *Doe, dem. Knight, v. Lady Smythe, M. 56 G. 3.* Page 347

ELEEMOSYNARY CORPORATION,

See MANDAMUS, 6.

ERROR, WRIT OF.

Leave refused to take out execution notwithstanding a writ of error, where it did not appear but that the declaration of the defendant that he would sue out a writ of error and delay plaintiff, was made before any action pending. An affidavit to ground a rule for leave to take out execution notwithstanding a writ of error may be sworn before judgment signed. *Baskett v. Barnard and Another, T. 55 G. 3.* 330

ESCAPE.

Bail put in after the term in which the writ is returnable, is not an answer to an action against the sheriff for an escape, brought before it was put in. *Moses and Another, Assignees, &c. v. Norris, M. 56 G. 3.* 397

EVIDENCE,

See DEVISE, 8. SETTLEMENT BY HIRING AND SERVICE, 1. WITNESS. PLEADING, 2.

1. In order to establish a settlement by apprenticeship, it was proved that the indenture was only of one part, and that upon application to the pauper, who was then ill and died soon afterwards, to know what had become of it, he declared that when the indenture expired it was given to him, and he burnt it long since; and it was also proved that enquiry was made of the executrix of the master, who said that she knew nothing about it: Held that

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this proof was sufficient to let in parol evidence of the contents of the indenture. *The King v. The Inhabitants of Merton, E. 55 G. 3.* Page 48

2. In an action by a copyholder against the lord of a manor for a false return to a mandamus, in which mandamus a custom was set forth in respect of copyholds granted for two lives, that the surviving life should renew, *paying to the lord such fine as should be set by the homage, to be equal to two years improved value*, and not guilty pleaded, depositions made in an ancient suit, instituted against a former lord of the manor by a person who claimed to be admitted to a copyhold for lives, upon a custom for any copyhold tenant for life or lives to change or fill up his lives, *paying to the lord a reasonable fine to be set by the lord or his steward*, and which depositions were made by witnesses on behalf of the said copyholder, were held to be admissible evidence for the lord, as depositions of persons called on behalf of a person standing *in pari jure* with the now copyholder, although it was not proved that the persons making such depositions were copyholders, but it appeared only from the depositions themselves, that they were such, and were acquainted with the customs of the manor. And their depositions, supposing them to be only admissible as declarations of persons deceased, were not inadmissible on account of their being made *post litem motam*, because the same custom was not in controversy in the former suit as in the present. *Freeman v. Phillipps and Another, H. 56 G. 3.* 486
3. In trespass *qu. claus. freg.* and not guilty, the issue at the trial being in which of two counties the *loc. in quo* was situate, an exemplification of

EVIDENCE.

of the depositions taken in an ancient suit to perpetuate testimony, to which plaintiff and defendant were privies, was held to be admissible evidence at the trial, though it appeared that the interrogatories upon which the depositions were framed were leading interrogatories, such as would not have been allowed to be put at the trial. *Williams v. Williams, H. 56 G. 3.* Page 497

4. The king's proclamation, reciting that it had been represented that certain outrages had been committed in different parts of certain counties, and offering a reward for the discovery and apprehension of offenders, is admissible evidence to prove an introductory averment in an information for a libel, that divers acts of outrage had been committed in these parts. *The King v. Sutton, H. 56 G. 3.* 592
5. So, a preamble to an act of parliament, reciting the existence of such outrages, and making provision against them, is admissible for the same purpose. *ib.*
6. It is not a misdirection, if the Judge refer the jury to their own knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence. *ib.*
7. An introductory averment that outrages had been committed *in and in the neighbourhood* of N., is divisible; so that it need not be proved that they were committed in both places; and fourteen or fifteen miles from N. may be considered in the neighbourhood. *ib.*
8. An introductory averment that the persons engaged in such outrages had been reputed to act under the direction of some *supposed and unknown person*, called, &c., does not necessarily import that the person is an existing person, but proof that he was a fictitious

FOREIGN COURT. 597

person set up for the purpose, is sufficient. Page 592

EXAMINATION,

See JUSTICES.

EXECUTION,

See ERROR, WRIT OF.

The Court refused to stay execution after verdict and judgment, which was affirmed on error, until the trial of an indictment for perjury against two of the plaintiff's witnesses in the action, and the rule nisi having been obtained upon the defendant's own affidavit alone, they discharged it with costs. *Warwick v. Bruce, E. 55 G. 3.* 140

EXECUTOR.

Although a person cannot be charged as executor de son tort while he acts under a power of attorney, made to him by one of several executors who has proved the will, yet if he continue to act after the death of such executor, he may be charged as executor de son tort, though he act under the advice of another of the executors who has not proved. *Cottle v. E. Aldrich, Executor of C. Aldrich, deceased, T. 55 G. 3.* 175

FELONY,

See COSTS, 4.

FIERI FACIAS,

See AMENDMENT, 2

FILIATION,

See BASTARD.

FOREIGN COURT,

See INSURANCE, 4.

In covenant to indemnify plaintiff from all debts due from the late partner-

partnership of plaintiff, defendant, and *D. B.*, and from all suits, &c. proof, of a copy of the proceedings in a foreign court in a suit there, instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, *per quod* a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt, &c.; was held to be conclusive against defendant, and that defendant was not at liberty to shew that the proceedings were erroneous. *Tarleton v. Tarleton*, *E. 55 G. 3.* Page 20

FRAUDS, STATUTE OF.

L., a corn-factor at *N.*, agreed to sell barley of the plaintiff to the defendant, to be delivered at *L.*'s warehouse at *D.*, to go by the first boat of *L.* which went from *N.* to *D.*, at 38s. per quarter, which was a higher price on account of its being to be delivered at *L.*'s expence; and the barley being then in the hands of *T.*, the defendant desired him to see it delivered and measured and put up properly, and the barley was sent by *L.*'s first boat, and the invoice delivered to the defendant, who requested time to pay, but afterwards refused to accept the barley: Held in assumpsit for the price that this was a contract for the sale of goods within 29 *Car. 2. c. 3. s. 17.*, and not a mixed contract for the carriage as well as sale, though the price was enhanced by the carriage; and that the defendant having appointed the particular boat, and having desired *T.* to inspect the loading, did not amount to an acceptance on his part. *Astey v. Emery, T.* 55 *G. 3.* 262

FREIGHT.

FREIGHT.

Covenant by charter-party made between the master of the ship and the freighter, upon a voyage from *Liverpool* to *Maranham*, and thence back to *L.*, that the freighter should pay for the freight from *L.* to *M.* 120*l.*, and from *M.* to *L.* at the rate of 2½*d.* per *lb.* for cotton, which should be delivered at *L.*, such freight to be paid as follows, viz. 120*l.* for freight of the outward cargo to *M.*, and as much cash as might be found necessary for the vessel's disbursements in *M.*, to be advanced by the freighter, his agents or assigns, to the master, when required, free from interest and commission, at the current exchange of the place, and the residue of such freight to be paid on delivery of the cargo in *L.* The ship arrived at *M.*, where the 120*l.* outward freight, and also 192*l.* for the necessary disbursements of the ship, were paid or advanced by the freighter to the master; and the ship received her homeward cargo and sailed for *L.*, but was lost by capture: Held that the freighter was not entitled to recover back the 192*l.* *De Silvale v. Kendall*, *E. 55 G. 3.* Page 37

GENERAL AVERAGE,

See *INSURANCE*, 3, 4.

HEIRS,

See *WARRANTY*.

HOUSE OF COMMONS,

See *COSTS*, 3.

IMPORTATION,

See *WOOL*.

IMPRISONMENT,

See *ARMY*.

INDICT-

INDICTMENT.

See CERTIORARI, 1, 2. COSTS, 2. 4.
NUISANCE, 1, 2. SENTENCE.

1. In an indictment for a libel against *W. S.*, omitting to allege that the defendant published it "*of and concerning W. S.*," held that such omission was not supplied by its being alleged in the introductory part, "that the defendant intended to vilify *W. S.*, he having been mayor of, &c., and to cause it to be believed that as such mayor he had practised corruption, and been guilty of abuse in respect to granting a licence to one *J. L.* to retail beer," &c., and concluding "to the injury and disgrace of *W. S.*" &c.; although the innuendos pointed the different parts of the libel to *W. S.* and to *J. L.*, and to the granting the licence. *The King v. Marsden*, *E. 55 G. 3.* Page 163
2. Indictment against a miller, charging in the same count that he received two separate parcels of barley, each of four bushels to be ground at his mill, and that he delivered three bushels 46lb. of oatmeal and barley meal mixed, other and different than the produce of the said four bushels, is ill for the uncertainty to which of the four bushels it relates. The indictment is also ill if it do not shew a certain place where the defendant received the barley to grind. *The King v. Haynes*, *T. 55 G. 3.* 214
3. Indictment does not lie against a miller for receiving good barley to grind at his mill, and delivering a mixture of oat and barley meal different from the produce of the barley, and which is musty and unwholesome. *ib.*

INNKEEPER.

An innkeeper is not answerable for the goods of his guest, which are lost through the negligence of the guest, out of a private room in the inn chosen by the guest for the purpose of exhibiting to his customers his goods for sale, the use of which room was granted by the innkeeper who at the same time told the guest that there was a key and that he might lock the door, which he neglected to do. *Burgess v. Clements*, *T. 55 G. 3.* Page 306

INNUENDO.

See INDICTMENT, 1.

INSURANCE.

See PREMIUM, RETURN OF.

1. Where a ship, being under conduct of a pilot, in her course up the river to *Liverpool*, was, against the advice of the master fastened at the pier of the dock-basin, by a rope to the shore, and left there, and she took the ground, and when the tide left her, fell over on her side and bilged, in consequence of which when the tide rose she filled with water, and the goods were wetted and damaged: Held that this was a stranding to entitle the assured to recover for an average loss upon the goods. *Carruthers v. Sydebotham*, *E. 55 G. 3.* 77
2. The assured shall not be prevented from recovering against the underwriter an average loss upon a damage by stranding occasioned by the neglect of a *Liverpool* pilot, appointed under stat. 37 G. 3. c. 78., while the ship is under his conduct. *ib.*
3. The wages and provisions of the the crew, while a ship remained in port, whither she was compelled to go for the safety of ship and cargo

cargo, in order to repair a damage occasioned by tempest, were held not to be the subject of general average; nor the expences of such repair; nor the wages and provisions of the crew during her detention in port, to which she returned, and was detained there on account of adverse winds and tempest; nor the damage occasioned to the ship and tackle, by standing out to sea with a press of sail in tempestuous weather, which press of sail was necessary for that purpose, in order to avoid an impending peril of being driven on shore and stranded. *Power and Another v. Whitmore*, E. 55 G. 3.

Page 141

4. The insurer of goods to a foreign country is not liable to indemnify the assured (a subject of that country,) who is obliged by the decree of a court there, to pay contribution to a general average, which by the law of this country could not have been demanded, where it does not appear that the parties contracted upon the footing of some usage among merchants, obtaining in the foreign country, to treat the same as general average, but such usage is to be collected merely from the recitals and assumption made in the decree. 141

5. An abandonment offered to be made by the assured to the underwriter, upon intelligence brought of the capture of the goods insured, which the underwriter refused to accept, was held not to entitle the assured to recover as for a total loss, where before action brought, the goods were recaptured and arrived at the place of destination, by which a partial loss only was sustained; for the assured can only recover an indemnity for such loss as he has sustained at the time of action

brought. *Patterson v. Ritchie*, M. 56 G. 3. Page 393

6. The striking of a ship on a rock, where she remained a minute and a half, and was laid on her beam ends, was held not to constitute a *stranding* within the meaning of that term in a policy of assurance. *M'Dougle v. The Royal Exchange Assurance Company*, H. 56 G. 3.

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7. An abandonment made after capture, under circumstances which would entitle the assured at the time to recover as for a total loss, is not defeated so as to become an average loss only, by the mere restitution and return of the ship's hull, before action brought, if the restitution be under such condition as to make it uncertain whether the assured may not have to pay more than its worth: as where a ship insured from *Liverpool* to *Sierra Leone*, was captured, plundered, her guns, stores, papers, and instruments taken away, and the voyage lost, and was carried to *Fayal*, where proceedings were instituted in the Admiralty Court, and sentence was pronounced in favour of the assured; but appeal was made against such sentence, and the assured abandoned, which abandonment the underwriter refused to accept and afterwards the remainder of her cargo was sold at *Fayal*, and the law expences paid thereout, and the rest left as a deposit to answer the event of the appeal, in order to obtain the release of the ship, and afterwards the ship returned to *Liverpool*: Held that the assured might recover for a total loss in an action brought after the ship's return to *Liverpool*. *M'Iver v. Henderson*, H. 56 G. 3. 576

JUDGMENT,

See PRACTICE, 1.

JURY.

JURY.

Where a common jury panel was returned, together with a special jury panel, and no special jurymen appearing, the cause was tried by a common jury, the trial was set aside. *Holt v. Meddowcroft*, H. 56 G. 3. Page 467

JUSTICES.

An order of removal made by two justices, upon the examination of the pauper taken by one of them, pursuant to stat. 49 G. 3. c. 124. s. 4. need not state the special circumstances of taking the examination, &c. *The King v. South Lynn, All Saints*, M. 56 G. 3. 354

LEASE.

1. A lease for years in consideration of a sum certain, and at a peppercorn rent, does not require an ad valorem stamp. *Roe dem. Larkin v. Chenhalls and Another*, E. 55 G. 3. 23
2. Lease of lands by indenture for 21 years, with proviso that it should be determinable, by lessee or lessor, at the end of the first 7 or 14 years, and memorandum, indorsed six years after the execution of the lease, "of its being agreed between the parties previously to the execution, that the lessor shall not dispossess nor cause the lessee to be dispossessed of the said estate, but to have it for the term of 21 years from this present time;" which memorandum was signed by the parties, and stamped with a lease stamp, but not sealed: Held that the lessor might, notwithstanding, determine the lease at the end of the first 14 years; for the memorandum did not operate as a new lease and surrender of the first lease. *Goodright dem. Nicholls v. Mark*, E. 55 G. 3. 30

3. Lease for years by indenture rendering rent and lessee covenants with lessor that he will pay the rent, and will not assign without leave of lessor, provided that if the rent be in arrear, or if all or any of the covenants *herinafter* contained on the part of the lessee shall be broken, it shall be lawful for lessor to re-enter; and there were no covenants on the part of the lessee after the proviso, but only a covenant by lessor that lessee paying, &c. and performing all and every the covenants *hereinbefore* contained on his part to be performed, &c. should quietly enjoy: Held that lessor could not re-enter for breach of the covenant not to assign, for the proviso is restrained by the word *hereinafter* to subsequent covenants, and though there were none such, yet the Court could not reject the word. *Doe d. Spencer v. Godwin and Others*, T. 55 G. 3. Page 265

LIBEL,

See EVIDENCE, 4. INDICTMENT, 1.

LICENCE.

1. A ship which is sent to a place within the limits of the S. S. Company's charter, in order to bring home part of a return cargo of another ship, is not protected by the licence granted by the S. S. Company to that other ship. *Cowie and Others v. Barber*, E. 55 G. 3. 16
2. A licence granted by the S. S. Company cannot operate retrospectively. *ib.*

LIMITATION OF ACTIONS,

See ARMY.

LIMITA-

LIMITATIONS, STATUTE OF.

In assumpsit for money due on an accountable receipt, plaintiff, in order to take the case out of the statute of limitations, called a witness, who proved that he called on defendant, and shewed him the receipt, and asked him if he knew any thing of it, to which defendant answered that he knew all about it; witness then asked him for the amount; to which he answered, it was not worth a penny; he should never pay it; that it was his signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it:" Held that this evidence was insufficient to charge the defendant with it, for there was no acknowledgment, but the contrary, that the debt ever existed. *Rowcroft v. Lomas*, H. 56 G. 3. P. 457

LIVERPOOL,

See Costs, 4.

MANDAMUS.

1. Where a copyhold tenant was forbid by the lord to cut underwood upon the copyhold without the lord's licence, the Court granted a mandamus to the lord to permit him to inspect the court-rolls so far as related to the cutting of underwood, after application to and refusal by the lord, although there was not any suit depending. *The King v. Tower*, E. 55 G. 3. 161
2. Although a mandamus does not lie to the churchwardens to make a church-rate, yet it lies to the churchwardens, &c. of two united parishes, under stat. 10 Ann. c. 11., to assemble a meeting, pursuant to s. 24., for the purpose of agreeing upon and ascertaining the monies

MANDAMUS.

and rates to be assessed for the repair of the church of one of those parishes. *The King v. The Churchwardens and Overseers of the Poor of St. Margaret and St. John, Westminster*, T. 55 G. 3. Page 250

3. Where the Court of Directors of the *East-India* Company sent to the board of controul for their approval, a draft of a dispatch directing payment to be made to H., formerly commissary of grain to the *Indian* army, for a quantity of rice belonging to H., and taken by the commander-in-chief for the use of the army, (for the having of which rice in his possession H. was dismissed by the Court of Directors, as being contrary to the existing regulations,) and the board of controul altered the draft of the dispatch by substituting a different and higher rate of payment to H. than that proposed by the Court of Directors, which the Court of Directors refused to transmit to *India*, denying the authority of the board of controul to make the alteration; upon a rule for a mandamus to the Court of Directors to transmit the altered dispatch, held that this alteration made by the board was not within 33 G. 3. c. 52. s. 17., by which the board are prohibited from directing the increase of the established salaries, allowances, or emoluments of any governor or other officer in the Company's service, unless proposed by the Directors; or within s. 18., by which the board are prohibited from directing the payment of any extraordinary allowance or gratuity to any person on any account whatever, to any greater amount than proposed by the Directors. And whether it be within s. 16., by which the board have authority to issue orders which relate to the civil or military government or revenues only, is a matter to be determined

terminated by appeal to the privy council, and not by this Court; but the Court enlarged the rule to give the Directors an opportunity to make such appeal. *The King v. The Court of Directors of the East-India Company*, T. 55 G. 3.

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4. Mandamus does not lie to restore the clerk and treasurer of the guardians of the poor of *St. Nicholas, Rochester*. *The King v. Guardians of St. Nicholas, Rochester*, T. 55 G. 3. 324
5. Where an order of removal from a township in *Yorkshire* to a parish in *Middlesex* was executed on the 12th of *January*, and the *Yorkshire Epiphany* sessions were holden on the 18th, and the parish did not appeal until the *Easter* sessions, when the justices refused to receive the appeal, this Court would not grant a mandamus to the justices to receive the appeal, it appearing that the appellants were not ready to enter and try their appeal at the *Easter* sessions, but only to enter and respite. *The King v. The Justices of the West Riding of York*, T. 55 G. 3. 327
6. Where the founder of an eleemosynary corporation by deed, 28 *Eliz.*, made by virtue of an act of parliament, granted that the same should be for the sustentation of poor, needy, and impotent people, and especially of such as should be maimed in the wars in the service of her majesty, to consist of a master and twelve brethren, to be appointed by him and his heirs, and that it should be governed by such rules and ordinances as were annexed, or at any time thereafter should be made by him; and afterwards he made certain ordinances, viz. that the people of certain towns and lordships should be preferred to the places aforesaid before any other, according to a certain

rotation, and that the Bishop, Dean, and Archdeacon of *Worcester* should be visitors, and should correct, punish, and reform all abuses and offences to be committed by the master and brethren, and see that his ordinance truly executed according to its meaning; and afterwards the heir of the founder, upon a vacancy of one of the brethren, appointed a person to succeed who was a soldier maimed in the wars, and poor and impotent, but not belonging to either of the towns or lordships mentioned in the rotation, against which appointment three persons belonging to the town next in the order of rotation, who were poor and impotent, and some of them wounded in the service, appealed to the visitors, on the ground that the appointee was ineligible, and that there were others beside themselves belonging to the said town, who were eligible: Held that such appeal well lay, and therefore the Court granted a mandamus to the visitors, who had heard the evidence in such appeal, but declined to act therein, to proceed and determine the appeal. *The King v. The Bishop of Worcester and Others*, M. 56 G. 3. Page 415

MAINTENANCE, ORDER OF, See BASTARD.

MANOR,

See EVIDENCE, 2. MANDAMUS, 1.

The lord of a manor has no right to enter on a copyhold of inheritance and cut timber for his own use, leaving sufficient for botes and estovers, if there be no custom in the manor. *Whitechurch v. Holworthy*, M. 56 G. 3. 340

MASTER

MASTER AND SERVANT,
See TROVER.

MEMORANDUM,
See LEASE, 2.

MILLER,
See INDICTMENT, 2, 3.

MISDIRECTION.

It is not a misdirection; if the Judge refer the jury to their own knowledge of any particular facts which have been proved, as matter of illustration only, and not as matter of evidence. *The King v. Sutton*, H. 56 G. 3. Page 532

MISNOMER,
See PRACTICE, 5.

MONEY HAD AND RECEIVED,
See PARTNERS, 2.

MURDER,
See CERTIORARI, 1.

MUTINY,
See ARMY.

NEW TRIAL.

1. In an action brought under the Chancellor's order, a new trial may be moved for in the court where the action is depending, though the action could not be sustained without the aid of the Chancellor's order. *Carstairs and Others, Assignees of Kensington and Others, Bankrupts, v. Stein and Others*, T. 55 G. 3. 192
2. New trial refused after verdict for defendant, upon not guilty to an indictment for a nuisance to a highway. *The King v. Mann*, M. 56 G. 3. 337

OVERSEERS.

NOTICE,
See BILLS OF EXCHANGE, 2.

NUISANCE,
See ACTION ON THE CASE. NEW TRIAL, 2.

1. A person may be indicted for unlawfully and injuriously carrying a child infected with the small-pox along a public highway, in which persons are passing, and near to the habitations of the king's subjects. *The King v. Vantandillo*, E. 55 G. 3. Page 73
2. It is an indictable offence for an apothecary unlawfully and injuriously to inoculate children with the small-pox, and while they are sick of it, unlawfully and injuriously to cause them to be carried along a public street. *The King v. Burnett*, T. 55 G. 3. 272

ORDER OF REMOVAL,
See JUSTICES. SETTLEMENT BY HIRING AND SERVICE, 1.

OVERSEERS,
See ASSUMPSIT.

An appointment by two justices of overseers of the poor, may be removed into this court by certiorari, without appealing against it to the quarter sessions, and this court will go into the question upon affidavit, whether the place for which the appointment is made be a township or vill, and if it appear by the affidavits that it is not, and be not stated to be such, or that it is reputed to be such, the Court will quash the appointment. *The King v. The Inhabitants of Standard Hill*, M. 56 G. 3. 378

PARTNERS,

PLEADING.

PARTNERS,

See WITNESS, 2.

1. If the names of two partners in trade appear (among others) on the certificate of registry, as owners of a ship, the registry acts do not prevent the shewing how and in what proportions the several owners are respectively entitled, and though the partners may derive title under different conveyances, yet if their shares were purchased with the partnership funds, and treated by them as partnership property, and the partners become bankrupt, these shares will be considered as the joint property. *Ex parte Jones and Others*, H. 56 G. 3. Page 450
2. In assumpsit against one of several partners for not delivering goods with a count for money had and received, to which defendant pleaded that the promises were made jointly with A. and B. it appeared that defendant being partner with A. and B. made the contract individually, though in the name of the partnership, and for the sale of partnership property, and that in fraud of his partners he received the money to his own use, though the bill drawn by him for the money was in the partnership name: Held that plaintiff might recover the money so received under the common count. *Hudson and Another v. Robinson*, H. 56 G. 3. 476

PILOT,

See INSURANCE, 1, 2.

PLEADING,

See BILLS OF EXCHANGE, 1—6.
EVIDENCE, 7, 8. PARTNERS, 2.
RELEASE, 2. VARIANCE, 1, 2, 3.

1. If a bail-bond be dated and made after the return of the writ, the

POOR-RATE.

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defendant may avoid it on *non est factum*. *Thompson v. Rock*, M. 56. G. 3. Page 338

2. If plaintiff declares against the sheriff for a false return of *nulla bona* to a *fi. fa.* against the goods of R. and J. S., and alleges that "although R. and J. S. had goods, &c. within his bailiwick, &c. yet defendant," &c.; this allegation is sustained, though plaintiff do not prove that R. S. had any goods; for it is severable that both or either of them had goods, &c. *Jones v. Sir W. Clayton*, M. 56 G. 3. 349
3. A way of necessity cannot be pleaded generally, without shewing the manner in which the land, over which the way is claimed, is charged with it. *Bullard v. Harrison*, M. 56. G. 3. 387

POLICY,

See PREMIUM, RETURN OF.

POOR,

See ASSUMPSIT.

POOR-RATE.

1. The trustees under the will of a person seised in fee of two third parts of a manor, subject to certain leases to a company of adventurers of the mines of lead, tin, and copper ore, and other minerals, under the moors, commons, or wastes of the manor, at a rent certain, are not rateable to the relief of the poor for such rent; and therefore a rate by which they were rated in one gross sum for such rent, and also in respect of their being owners and occupiers of the moors, commons, and wastes within the manor, was held ill. *The King v. Welbank and Others*, T. 55 G. 3. 222
2. A canteen in barracks demised to B. by the barrack-board for a year, at a rent of 15*l.* for the canteen and buildings, and also the farther sum of

of 510*l.* for the privilege of using the same as a canteen, and selling therein provisions and liquors, &c. usually sold by sutlers, with power of distress for the aggregate sum, was held to be one entire rent for the canteen; and therefore *B.* was held rateable to the relief of the poor as occupier of the canteen, in respect of the 525*l.* aggregate rent, and not merely in respect of the 15*l.* *The King v. Bradford*, T. 55 G. 3. Page 317

POUNDAGE,

See SHERIFF.

POWER.

See DEVISE, 7.

PRACTICE.

See BAIL, 1, 2. CERTIORARI. ESCAPE. JURY.

1. In order to obtain leave to enter up judgment on an old warrant of attorney, it must be sworn, that the defendant was alive on a day in full term; the essoign day is not sufficient. *Eyles v. Warren*, T. 55 G. 3. 174
2. When in proceedings by original against four, the venue is changed into a county palatine on the application of three of the defendants, who appear separately by one attorney, and undertake not to assign the want of an original for error, the Court will require a similar undertaking from the fourth, who has appeared by a different attorney. *Eccles and Another v. Holland and three Others*, T. 55 G. 3. 233
3. Affidavit of debt, "that defendant is indebted to plaintiff in 6000*l.* upon a bond, bearing date, &c. and

PREMIUM, RETURN OF.

made and entered into by defendant to plaintiff in the penal sum of 25,000*l.*" without shewing the condition of the bond, is insufficient; and the Court discharged defendant on common bail. *Bosanquet and Others, &c. v. Fillis*, T. 55 G. 3. Page 330

4. The year being in figures in the *English* notice does not make the service of the process irregular. *Butler v. Cohen*, T. 55 G. 3. 335
5. Defendant discharged on common bail, and notice of declaration set aside, on the ground of a misnomer in the Christian name, upon application made before the time for pleading in abatement expired. *Smith v. Innes*, M. 53 G. 3. 360
6. Service of a latitat directed to the sheriff of *Surrey*, at *Batson's* coffee-house in the city of *London*, is irregular, and the Court will set it aside. *Secus* if there be a doubt as to the confines. *Chase v. Joyce* M. 56 G. 3. 412
7. The sheriff may be ruled to bring in the body on the same day that he returns cepi corpus, if the time for putting in bail has expired. *The King v. The Sheriff of Middlesex, in a Cause of Pouchee v. Lieven*, M. 56 G. 3. 427

PREAMBLE,

See EVIDENCE, 5.

PREMIUM, RETURN OF.

The assured were held not entitled to a return of premium upon a policy at and from a place within the limits of the *South-Sea* Company's charter, the ship being without a licence from the *S. S. Company* at the commencement of the risk, and up to the time of her loss, although the assured procured a licence as soon as they could, and before

PRIZE-MONEY.

before they knew of her loss, and the licence was made to relate to a time antecedent to the loss. *Cowie and Others v. Barber, E. 55 G. 3.* Page 16

PRIVILEGE.

An attorney sued by *bill* jointly with a person having privilege of parliament does not lose his privilege. *Ramsbottom and Others v. Harcourt and Bawden, H. 56 G. 3.* 585

PRIZE-MONEY.

1. The King's warrant of the 26th of June 1800, for the distribution of prize taken in the expedition to the *Texel*, did not intend to authorize the two commanders in chief, and the flag and general officers, or such of them as could conveniently be assembled, to determine or to refer to the determination of others, the right of a flag officer claiming his share of the distribution, as being the naval commander in chief at the time of the capture. *Lord Viscount Duncan, Executor of Lord Viscount Duncan, deceased, v. Mitchell, Administrator of Sir A. Mitchell, deceased, E. 55 G. 3.* 105

2. Where an admiral, appointed to the command of an expedition from this country was instructed to put himself and his fleet under the command of the admiral commanding the station, if his co-operation should be necessary, and did accordingly put himself and his fleet under such command, and was directed by the admiral of the station, whilst he remained with him to consider himself under his command, and to attend to all orders and signals whilst the fleets were on the same station, and the admiral of the station did several acts

QUO WARRANTO. 607

forwarding the objects of the expedition, and issued orders relating thereto, but in consequence of ill health left the station with the ships under his command, and sailed for *England*, and at the time when the enemy's fleet agreed to surrender was out of sight, and not in a situation to have afforded the least assistance, and the enemy's fleet surrendered the day after he sailed: Held that the admiral of the station was not entitled to his share of distribution of prize as commander-in-chief of the expedition at the time of the capture, but that the admiral appointed to the command of it was. *Ib.* Page 105

PROCLAMATION,

See EVIDENCE, 4.

PROMISSORY NOTES,

See VARIANCE, 3.

A note promising to pay *J. F.* or order a sum certain, the amount of the purchase-money of a quantity of fir belonging to *H.*, with an indorsement thereon at the time of making the note, that it was given on condition that it should be void if any dispute should arise between *H.* and *W.* respecting the fir, was held not to be a promissory note within stat. 3 & 4 Ann. c. 9. *Hartley v. Wilkinson and Another, E. 55 G. 3.* 25

PROMOTIONS, 449, 450.

QUO WARRANTO.

Upon an application for a quo warranto information, suggesting that the defendants were elected contrary to the provisions of a particular charter,

charter, the affidavit must state that the charter was accepted, or that the usage has been in conformity to the charter; and the Court, after determining that the affidavit was ill for omitting so to state, refused leave to amend it. *The King v. Barzey and Others*, T. 55 G. 3. Page 253

RELEASE.

1. The lessor of the plaintiff in ejectment, cannot release the action. *Doe, dem. Byne and Others, v. Brewer and Another*, T. 55. G. 3. 300
2. A release contained in a deed, which recited that defendant stood indebted to his creditors in the several sums set to their respective names, and that they had agreed to take of defendant 15s. in the pound upon the whole of their respective debts, whereby the creditors, in consideration of the said 15s. in the pound paid to them before executing the release, each and every of them did release defendant from all manner of actions, debts, claims, and demands in law and equity, which they or any or either had against him, or thereafter could, should, or might have, by reason of any thing from the beginning of the world to the date of release, was held to release nothing but the respective debts, and all actions and demands touching them; for the general words of release have reference to the particular recital, and shall be governed by it.

Therefore where to debt brought by plaintiffs on defendant's bond, the defendant pleaded this release, held that plaintiffs, in their replication, might plead that the bond was given by the defendant with others as a security for the repayment of bills drawn upon them by the defendant,

and for monies advanced to him, and that the sum set against their names in the release was due to them from the defendant on the day of the release on his own account, and the monies intended to be secured by the bond, although part was due at the time of executing the release, were not, nor was any part included or meant by them or by defendant to be included in the sum set against their names or in the release. *Payler and Others v. Homersham*, M. 56 G. 3. Page 423

RELIEF, ORDER FOR,
See APPEAL.REMOVAL, ORDER OF,
See JUSTICES. SETTLEMENT BY
HIRING AND SERVICE, 1.RENT,
See POOR-RATE, 1.REPLEVIN BOND,
See DEBT, 2.RETURN OF PREMIUM,
See PREMIUM, RETURN OF.REVOCATION.
See DEVISE, 1.—WILL, 1.SALE OF GOODS,
See FRAUDS, STATUTE OF.

SALVAGE.

1. Where a ship was chartered upon a voyage out and home, at 2l. 10s. per ton, register measurement, per month, 2500l. to be paid on clearing outwards, the like sum at the end of twelve months, and the remainder three months after being reported at the custom-house on her

her return; and the ship delivered her outward cargo, and sailed with her homeward cargo, and was captured and recaptured on the homeward voyage, and the ship and cargo were sold by consent of all parties, the owner and charterers having respectively made claim in the Admiralty Court to ship and goods, where restitution was decreed to them upon payment of salvage: Held that the charterers (having paid the two sums of 250*l.*) were not liable to contribute to the ship-owner for salvage in respect of their goods, where the proceeds of the goods fell short of the sum due for the residue of the freight, but that the ship-owner in respect of the freight was liable to the whole salvage; and the charterers having paid such contribution out of the proceeds of the goods, under a security given by them for payment of the salvage, with the assent of the ship-owner as far as his liability was concerned; held that they might set it off in an action of covenant by the owner for the residue of the freight. *Cox and Others, Assignees of Swan and Anderson, Bankrupts, v. May and Others, E. 55 G. 3. Page 151*

2. *Secus* as to the charges of establishing the claim to the cargo, and procuring the decree of restitution, for held that the charterers alone were liable to them. *ib.*

SCIRE FACIAS.

In scire facias to have execution for damages and costs recovered against J. B. upon a recognizance of bail, conditioned in case the said J. B. and G. K. should be condemned that J. B. and G. K. should pay, &c. or render themselves, the plaintiffs allege that J. B. and G. K. have not paid, &c. or rendered themselves, according to the form and effect of

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the recognizance: Held on special demurrer that the breach was ill assigned; for *non constat* but that J. B. who was condemned, has paid or rendered. *Wilkinson and Others v. Thorley and Another, E. 55 G. 3. Page 33*

SENTENCE,

See SESSIONS.

SERVANT,

See TROVER.

SESSIONS,

See COSTS, 2.

An indictment lies to the quarter sessions for lighting fires on the coast contrary to stat. 47 G. 3. sess. 2. c. 96., and if it be removed and the defendant be tried and convicted before a Judge at *Nisi Prius*, this Court shall award sentence. *The King v. Cock, E. 55 G. 3. 71*

SETTLEMENT,

See JUSTICES.

SETTLEMENT—by Apprenticeship,

See EVIDENCE, 1. WITNESS, 1.

A parish-apprentice was, before the passing of stat. 18 G. 3. c. 47., bound till 24, and served till nearly attaining 21, when his master being about to leave the parish, and no longer wanting his service, told him that he might leave him and go where he liked, and shift for himself, but if he could not provide for himself, he might return to him; upon which he quitted, and when he was about four months past 21 bound himself by indenture as apprentice to another master for three years, and served with him the three years: Held that he did not acquire a settlement by service

S s vice

vice under the second indenture. *The King v. The Inhabitants of Bow, otherwise Nymett Tracey*, M. 56 G. 3. Page 383

SETTLEMENT — by Hiring and Service.

1. An order for the removal of a married woman (not stating her to be such) and her children to Y. adjudging that the lawful settlement of her and her children is in Y., was held well without adjudging that Y. was her husband's settlement; and proof by the mother of the husband that he gained a settlement in Y. by hiring and service was held sufficient without calling the husband, although it appeared that he was in this country. *The King v. Inhabitants of Ysphyty*, E. 55 G. 3. 52
2. A hiring at 8s. per week, and two guineas for the harvest to do any thing the gardener should set him about, is not a yearly hiring. *The King v. Inhabitants of Lambeth*, T. 55 G. 3. 315

SETTLEMENT — by a Tenement of 10l. a-Year.

1. Where a person rented and resided on a tenement of 4l. a-year, and in the same year bought at a public auction, on 12th August, four lots of oats growing in one field, for 12l. 14s., which oats were of different kinds, that ripened at different periods, and he began to reap them on 14th September, and continued reaping them as they ripened, and carted them away at intervals between the 14th September and the 3d November, on which day he carted off the last load: Held that he did not thereby acquire a settlement. *The King v. The Inhabitants of Bowness*, T. 55 G. 3. 210
2. Where pauper's husband, being a soldier, deserted and left his family

in the parish of S., and the wife during his absence, took a house at 5l. a-year in S., and lived in it with her family, and also took another house at five guineas a-year, and put some of her husband's furniture in it, intending to remove thither, but never did remove, but underlet it; and during the time she held both, her husband came to see her, and remained seven weeks concealed in the house where she lived, and was made acquainted with her having taken the two: Held that the husband did not acquire a settlement by this residence. *The King v. The Inhabitants of Ashton-under-Lyne*, M. 56 G. 3. Page 357

3. The taking a grant of a licence from the lord of a manor to erect a cottage on a piece of land, rendering an annual rent of 10s. 6d. as a quit-rent, and also a grant of a licence to inclose a piece of ground for a garden to the said cottage, both being parts of the waste, and building a cottage thereon, and residing in it a year and a half, were held not to confer a settlement; this being a licence only, and not a grant of any interest in land. *The King v. The Inhabitants of Horndon-on-the-Hill*, H. 56 G. 3. 562

SHERIFF,

See ESCAPE.

Where the sheriff levied under a *fi. fa.*, and received the money, and afterwards the judgment and execution being set aside for irregularity, and the money ordered to be returned, paid it back with the assent of the plaintiff: Held that the stat. 43 G. 3. c. 46. does not take away his remedy by action of debt against the plaintiff for his poundage. *Rawstorne v. Wilkinson*, T. 55 G. 3. 256

SHIP,

STATUTES.

SHIP,

See BANKRUPT, 1. PARTNERS, 1.

SIMONY,

See BOND, 1.

SMALL-POX,

See NUISANCE, 1, 2.

SOUTH SEA COMPANY,

See LICENCE, 1, 2.

SPECIAL DAMAGE,

See ACTION ON THE CASE, 2.

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STATUTE OF FRAUDS,

See FRAUDS, STATUTE OF.

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STAYING EXECUTION,

See EXECUTION.

STRANDING,

See INSURANCE, 1, 2. 6.

SURETY.

See BANKRUPT, 2.

SURRENDER,

See LEASE, 2.

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TITHES.

TITHES.

Oak wood of more than 20 years' standing, not growing from acorns, but from old stools, which stools belonged originally to trees which had stood more than 20 years, were held not to be so clearly entitled by stat. 45 Ed. 3. c. 3. to exemption from tithe, as to make a verdict which subjected them to tithe a wrong verdict. *Ford, Widow, and Another Executors of H. Ford, Clerk, v. Racster, E. 55 G. 3.* Page 130

TRANSPORT,

See CHARTERPARTY.

TRIAL,

See JURY.

TROVER.

A servant may be charged in trover, although the act of conversion be done by him for the benefit of his master. *Stephens and Others, Assignees, v. Elwall, T. 55 G. 3.* 259

TRUSTEES,

See ACTION IN THE CASE.

USURY.

Whether a commission of one-half per cent. upon a banking account be usurious or not, is a question for the jury, depending upon whether it may be ascribed to a reasonable remuneration for trouble and expence, or whether it be a colour for the payment of interest above 5l. per cent. upon a loan of money, and if there be a contrariety of evidence upon that point, the Court will not set aside the verdict and grant a new trial, although the verdict be against the opinion and direction of the Judge who tried it; unless

it appears clearly that the jury have drawn an erroneous conclusion. *Carstairs and Others, Assignees of Kensington and Others, Bankrupts, v. Stein and Others, T. 55 G. 3.* Page 192

VARIANCE,

See BILLS OF EXCHANGE, 1. 6.

1. Where plaintiff declared in covenant, that defendant demised to him a wharf and storehouses, &c., the word in the deed being *storehouse*: it was held to be a fatal variance, although no breach was assigned upon the demise of the storehouse, but only, upon a covenant by defendant, not to suffer a wharf to be erected on his estate to the injury of the said wharf, *per quod* plaintiff was deprived of certain gains which would otherwise have arisen from wharfage dues, store-room, &c. *Hoar v. Mill, H. 56 G. 3.* 470
2. In debt on a mortgage-deed for non-payment of the mortgage-money, plaintiff declared that defendant bound himself, *his heirs*, executors, and administrators, and proved a deed in which defendant bound himself, his executors and administrators only: Held that this was not a material variance. *Hamborough v. Wilkie, H. 55 G. 3.* 471 n.
3. Where the indorsee declared against the maker of a promissory note, *that he made the same payable at the house of Messrs. B. and Co., London*, and upon production of the note at the trial it appeared that the address at the house of Messrs. B. and Co. was not a part of the note, but only a memorandum at the foot of the note: Held that this was a variance. *Eron v. Russell, H. 56 G. 3.* 505

VENUE.

WILL.

VENUE,
See PRACTICE, 2.

VISITOR,
See MANDAMUS, 6.

WARRANTY.

A., B., C., tenants in common in tail, B. releases to A. and C. and their heirs all his undivided part, and all his estate and interest therein, habend. to them, their heirs and assigns, as tenants in common, and not as joint tenants to the use of them, and their assigns, and B. covenants with A. and C., their heirs and assigns, that he, his heirs, &c. would warrant and for ever defend the premises to A. and C. (without the word heirs) against all persons, and that A. and C., their heirs and assigns, should quietly enjoy, &c.: Held that the release passed the interest of B. to A. and C. as tenants in common, and not as joint-tenants, and that the warranty annexed to the release created a discontinuance of B.'s estate tail, and barred B. and those claiming under him, as against those claiming under the release, of a subsequently-acquired right in fee. Doe, dem. Hutchinson and Others, v. Prestwidge, T. 55 G. 3. Page 178

WAY,

See PLEADING, 3.

A person who prescribes in a *que estate* for a private way, cannot justify going out of it on the adjoining land, because the way is impassable. *Bullard v. Harrison*, M. 56 G. 3. 387

WILL,

See DEVISE.

J. B. married and afterwards made his will and devised to his neice,

WITNESS.

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and afterwards died, leaving his wife ensient with a daughter, which was unknown to him: Held that the birth of the daughter was not a revocation of the will. *Doe, dem. White v. Barford and Another*, E. 55 G. 3. Page 10

WITNESS.

1. Where, upon appeal against an order of removal, the appellants, in order to shew a settlement in a third parish, called the pauper to prove that he was bound apprentice by indenture to *D.* and served in the third parish, and then produced the indenture, but failing to prove the death of the subscribing witness, so as to entitle them to prove his hand-writing, proposed to call the pauper to prove his own execution, and that of the other parties to the indenture, which evidence the Sessions rejected: Held that the Sessions did well, for the rule which requires the subscribing witness to be produced, or his absence accounted for, applies as well to settlement cases as others. *The King v. The Inhabitants of Harringworth*, M. 56 G. 3. 350
2. In assumpsit against one of several partners for not delivering goods, with a count for money had and received, to which defendant pleaded that the promises were made jointly with *A.* and *B.*, it appeared that defendant being partner with *A.* and *B.* made the contract individually, though in the name of the partnership, and for the sale of partnership property, and that in fraud of his partners he received the money to his own use, though the bill drawn by him for the money was in the partnership name: Held the plaintiff might recover the

the money so received under the common count. And *A.* was held a competent witness for the plaintiff to prove that defendant was never authorised or employed by the partners to make the contract, and that he received the money to his own use. *Hudson and Another v. Robinson*, *H.* 56 G. 3. Page 476

The statute 43 G. 3. c. 153. s. 13. does not authorize the importation of *cotton wool* into *Great Britain*. *Oliverson v. Loughman*, *M.* 56 G. 3. Page 346

See PRACTICE, 4.

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